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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 97.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE PROPELLER "NEW YORK," PETITIONER,

vs.

THE ERIE AND WESTERN TRANSPORTATION COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 23, 1905.
CERTIORARI AND RETURN FILED JUNE 30, 1905.

(16,159.)

15362

(18,159.)

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INDEX.

	Original.	Print.
Caption	a	1
Statement by appellant of parts of record to be printed	1	1
Statement by intervenors of parts of record to be printed	2	2
Transcript from the district court of the United States for the eastern district of Michigan	2	2
Libel of Erie and Western Transportation Co.	3	3
Answer of Union Steamboat Co.	7	6
Order granting leave to file cross-libel	11	9
Cross-libel of Union Steamboat Co.	11	9
Stipulation as to proofs, &c.	14	12
Opinion of Swan, J.	15	13
Petition of Insurance Co. of North America	18	15
Answer of Union Steamboat Co. to petition of Insurance Co. of North America	24	20
Mandate of United States circuit court of appeals, sixth circuit	25	21
Mandate of Supreme Court of United States	26	22
Stipulation as to losses	28	23

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	Original.	Print
Decree	29	24
Order dismissing cross-libel *nunc pro tunc*	31	26
Prayer for appeal	31	26
Assignment of errors	32	26
Order substituting F. H. and G. L. Canfield, proctors	32	27
Bond	33	27
Clerk's certificate	34	28
Citation	35	29
Appearance for appellant	37	30
Motion to dismiss appeal	37	31
Argument and submission of motion	39	32
Order denying motion to dismiss	40	33
Opinion on motion	40	33
Minute entry of argument on merits	46	38
Minute entry of submission	47	38
Motion for writ of mandamus	47	38
Affidavit of C. E. Kremer	48	39
Draft of decree in district court	50	41
Decree	53	43
Opinion	54	43
Clerk's certificate	65	52
Writ of certiorari	66	52
Return on writ of certiorari	67	53

a Filed Aug. 29, 1900. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

THE UNION STEAMBOAT CO., Claimant of the Propeller "New York," Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Appellee-. } No. 889.

Appeal from the district court of the United States for the eastern district of Michigan.

Record.

Original transcript filed July 25, 1900.

1 *Transcript of Record.*

The United States Circuit Court of Appeals for the Sixth Circuit.

THE ERIE & WESTERN TRANSPORTATION COMPANY AND INTERvening Petitioners, Appellees,
vs.
THE PROPELLER NEW YORK; THE UNION STEAMBOAT COMPANY, Claimant and Appellant.

Statement.

Now comes said appellant, and states the parts of the record filed in the above cause, necessary for consideration in the hearing of said appeal, in accordance with rule 23 of this court, subdivision 3 thereof, viz:

	Record p.
The libel of the Erie & Western Transportation Co	1
Answer of Union Steamboat Company	8
Order granting claimant leave to file cross-libel	11
Cross-libel of Union Steamboat Company	12
Stipulation as to damages sustained by propeller New York	213
Opinion of H. H. Swan, district judge	196
Intervening petition of Insurance Co. of North America	215
Answer of Union Steamboat Company	227
Mandate of United States circuit court of appeals	229
Mandate of Supreme Court of the United States	231
Stipulation fixing damages sustained by parties	233
Final decree entered March 24th, 1900	234
Appellant's claim of appeal	238
Appellant's assignment of errors	239
Order substituting F. H. & G. L. Canfield as proctors for Erie & Western Transportation Company, trustee	240

Bond on appeal .....
Clerk's certificate 245
Citation 246

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
Proctors for Appellant.

July 25, 1900.

2 No. 889. United States circuit court of appeals for the sixth circuit. The Erie & Western Transportation Company and Intervening Petitioners, appellees, *vs.* The Propeller New York, The Union Steamboat Company, claimant, appellant. Statement by appellant under rule 23. Filed July 26, 1900. Frank O. Loveland, clerk. C. E. Kremer, H. C. Wisner, F. C. Harvey, proctors for appellant.

The United States Circuit Court of Appeals for the Sixth Circuit.

THE ERIE & WESTERN TRANSPORTATION COMPANY AND INTERVENORS, Appellees,
vs.
THE PROPELLER "NEW YORK;" THE UNION STEAMBOAT COMPANY, Claimant & Appellant.

Now comes the intervenors in the above-entitled cause and without waiving any objection whatever to the validity of the appeal taken in said cause or to the jurisdiction of this court in said cause, state that in addition to the parts of the record which the proctors for the appellant propose shall be printed in said cause, the opinion of the district judge holding the "New York" wholly in fault for the collision, and the order dismissing the cross-libel entered *nunc pro tunc*, should also be printed.

F. H. & G. L. CANFIELD,
Proctors for Intervenors.

Transcript of Record.

Pleas of the district court of the United States for the eastern district of Michigan, begun and held at the district court-room, in the city of Detroit, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and ninety-one.

Be it remembered that on the eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-one, the Erie and Western Transportation Company, by H. D. Goulder,
3 and Shaw & Wright, its proctors, came into the said court and filed a libel in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

The libel of the Erie and Western Transportation Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal office in the city of Philadelphia, Pa., against the propeller New York, her engines, boilers, machinery, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interests therein, in a cause of collision civil and maritime; and thereupon said libellants do allege and propound as follows:

First. That your libellant at the time of the collision hereinafter mentioned, was the sole owner of the propeller "Conemaugh," which said propeller, as well as the propeller "New York," were vessels of twenty tons burden and upwards, employed in the business of commerce and navigation upon the Great Lakes and the navigable waters connecting the same.

Second. That on the 21st day of October, A. D. 1891, the said propeller "Conemaugh," being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts, upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Milwaukee, Wisconsin, to the port of Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting principally of flour, bran, oil cake and pig lead. That about eight o'clock on the evening of said day a collision occurred between the above-named propeller "Conemaugh" and "New York" in that part of the Detroit river a short distance below the town of Sandwich, on the Canadian side of the river. That before and at the time of said collision the said propeller "Conemaugh" was in every particular obeying the rules of navigation with due regard to the safety of the said propeller and the vessels that she might meet and pass; and that the said collision occurred without any fault, negligence or misconduct on the part of libellant or those in charge and on board of the said propeller "Conemaugh."

4 Third. On the American side of the Detroit river a little below the River Rouge was, and is, a coal dock known as "Smith's coal dock." Between seven and eight o'clock p. m., of said day, the weather then being clear and fine, the "Conemaugh" was proceeding down the Detroit river to the American side of mid-channel, having hauled some to starboard to avoid some piles driven in the channel, and when a half or three-quarters of a mile above the said coal dock, she received a signal of two blasts from a steamer which, with four barges in tow, had, theretofore been going down the Canadian side of the river and was then rounding in and up to and was near the said coal dock, exhibiting her masthead and green lights to the "Conemaugh."

The "Conemaugh's" engine was at once checked and remained checked until after the time of collision hereinafter stated, her helm starboarded, and she answered with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was "rounding to" and which then stretched out in the river towards the Canadian side.

The "Conemaugh" then made the lights of a steamer, which proved to be the said propeller "New York," then down the river below the said tow and coming up so heading towards the "Conemaugh," and on such a course that the "Conemaugh," as she was proceeding, would cross the "New York's" course before the "New York" could reach the point of intersection of the two courses.

The "Conemaugh" at once blew to her a signal of two loud and distinct blasts of her whistle, thus notifying the "New York" that the "Conemaugh" was so directing her course as to go well in on the Canadian shore and to leave the tow and the "New York" to starboard as she should come abreast of them respectively.

Not receiving a reply thereto, the "Conemaugh" promptly repeated the signal of two blasts. To this second signal the "New York" did not reply, and again the "Conemaugh" blew a two-blast signal; when the "New York," which had all the time been coming rapidly up the river, still without replying to any of the "Conemaugh's" signals, turned suddenly and rapidly to starboard, swinging over toward the Canadian shore; whereupon the "Conemaugh" blew alarm whistles and hard-starboarded her helm.

5 Notwithstanding there was ample room, had the "New York" properly approached, and had she been properly handled, for the "Conemaugh" and the "New York" to have safely passed each other and the tow in accordance with the signals of the "Conemaugh," the "New York," first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on full speed, and with her stem struck the "Conemaugh" with tremendous force on the starboard side, abreast the Texas, and almost immediately the "Conemaugh" struck the Canadian bank of the river, and filled and sank, the New York having cut deeply into her and crushed her side. That the signals of the "Conemaugh," above mentioned, were of the proper and usual character, given by loud and distinct blasts of a good and sufficient steam whistle, but the "New York" throughout disregarded every one of said signals and ran over into and collided, at full speed, with the "Conemaugh," without answering or heeding or herself giving any signals whatever.

That before and at the time of said collision, it was a quiet, calm and clear evening, lights could be seen a long distance away, and steam whistles could be heard at a great distance.

Fourth. The libellant is informed and believes that the said collision is entirely due to the fault of those in charge of the navigation of the said propeller "New York," and charges that the said propeller is at fault as follows:

1. In not keeping a proper and sufficient lookout.

2. In being in charge of incompetent, reckless and negligent officers.

3. In adopting and pursuing the course she did until close to the point where she would meet the "Conemaugh" and then in departing violently to starboard from said course.

4. In changing her course a second time and turning and swinging over and into and against the "Conemaugh."

5. In not passing clear on the starboard side of the "Conemaugh," or checking, stopping and reversing her engines before her actions made the same necessary.

6. In that, being the ascending vessel, she maintained her course, and in not checking her speed or stopping if, for any reason, she found it necessary or advisable not to proceed on the course she had previously adopted.

7. In not answering the "Conemaugh's" signals and in not giving the "Conemaugh" any signal whatsoever.

8. In disregarding the signals she had received from the
6 "Conemaugh."

Fifth. That by reason of the said collision, the said propeller "Conemaugh" and her cargo became and were greatly damaged.

That in raising the said propeller and her cargo the libellant has been put to the great expense, as near as the same can now be estimated, of, to wit, the sum of ten thousand dollars ($10,000.00).

Also, that by said collision, as nearly as can be ascertained, the hull of the "Conemaugh" sustained damage to the amount of twenty thousand dollars ($20,000.00), and her cargo to the amount of thirty thousand dollars ($30,000.00.)

That at the time of said collision the said propeller "Conemaugh" was employed in carrying freight, which was a profitable employment to libellant and which, by reason of said collision, it is unable to continue for the remainder of the season of navigation of the year 1891, to libellant's loss, as near as can be ascertained, ten thousand dollars ($10,000.00).

Sixth. That on account of said collision, the aggregate amount of damage, here sued for and sustained by the libellant as the owner of the said propeller "Conemaugh," and also as trustee for the owners of the said cargo, is, as near as the same can be ascertained, the full sum of seventy thousand dollars ($70,000.00).

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, and that the said propeller "New York" is now or soon will be within the district aforesaid.

Wherefore, your libellant prays that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said propeller "New York" her engines, boilers, machinery, boats, tackle, apparel and furniture; and that all persons having an interest therein may be cited to appear and answer all and singular the matters aforesaid; that this honorable court may be pleased to decree the payment of the damages aforesaid with costs; that the said

propeller "New York" may be condemned and sold to pay the same; and that your libellant may have such other and further relief as in law and justice this libellant is entitled to receive.

THE ERIE AND WESTERN TRANSPORTATION COMPANY,
By JOHN C. SHAW, *Proctor for Libellant.*

H. D. GOULDER AND
SHAW & WRIGHT,
Proctors for Libellants.

7 STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
County of Wayne, }

John C. Shaw, of the city of Detroit, one of the proctors for the libellant in the foregoing libel, being duly sworn, says: That said libellant, as deponent, is informed and believes, is a corporation duly organized and existing under the laws of the State of Pennsylvania, and is a resident of said State, and that none of the libellant's officers are now within the State of Michigan. That the matters set forth in the foregoing libel are derived from sworn statements obtained from various witnesses of the therein-mentioned collision, and from other reliable sources by this deponent. That deponent has read the foregoing libel and knows the contents thereof, and that the matters therein stated are true, to the best of the knowledge, information and belief of this deponent.

JOHN C. SHAW.

Sworn to and subscribed before me, this 11th day of November, A. D. 1891.

HENRY A. HARMON,
Notary Public, Wayne County, Michigan.

In the District Court of the United States for the Eastern District of Michigan.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

The answer of the Union Steamboat Company to the libel of The Erie & Western Transportation Company against The Propeller "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture, alleges as follows:

First. That the above-named claimant is now and was at the different times mentioned in said libel, a corporation duly organized and existing under the laws of the State of New York, with its principal office in Upper Nyack, Rockland county, in the State of New York.

Second. That the said claimant is now and was at the time of said collision mentioned in said libel the sole owner of the said propeller "New York," her engines, boilers, machinery, boats, tackle, apparel and furniture.

Third. That the claimant admits the truth of the allegations of

the first article of said libel, and that as to the matters and
8 things contained in the second, third and fourth, fifth and sixth articles of said libel, claimant alleges, upon information and belief, that they are in great part untrue and falsely alleged; and claimant, therefore, denies the same except wherein they may be hereinafter specifically admitted to be true.

Fourth. And for a full and further answer to the said libel, claimant alleges that on the 21st day of October, 1891, the propeller New York, being then and also at the time of the collision mentioned in said libel, tight, staunch and strong, and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts upon the lookout for the safety of the said vessel, and having her side and bright lights properly stationed and burning brightly, was bound on a voyage from Buffalo, New York, to the port of Milwaukee, Wisconsin, laden with a cargo of general merchandise. That on the said day, between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh, in the Detroit river, below the town of Sandwich, on the Canadian side of the river; that before and at the time of said collision the propeller New York was bound up said river, and when nearing the point in said river below where the River Rouge empties into the Detroit river, a steamer, with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboard so as to go
close under her stern. While passing under the stern of this
9 barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller which proved to be the Conemaugh were heard close at hand and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York which was then swinging under a hard-starboard helm. A collision was then invitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this the Conemaugh with considerable headway,

continued on her course across the bows of the New York so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank, and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge, she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a manœuver was attempted a collision could best be avoided by swinging clear under a hard-a-starboard helm.

Fifth. That claimant is informed and believes that said collision was due entirely to the fault of those in charge of the navigation of the propeller "Conemaugh," and charges that said propeller is at fault as follows:

1st. In not keeping a proper and sufficient lookout.

2nd. In being in charge of incompetent, reckless and negligent officers.

3rd. In not carrying the lights required by law brightly burning and properly displayed.

4th. In adopting a course which would take her into Canadian waters, and on that side of the channel usually navigated by upbound steamers.

5th. In attempting to pass the New York starboard side to starboard side instead of port side to port side.

6th. In changing her course in pursuance with such passing signals before receiving an assenting answer to such signals.

7th. In not keeping out of the way of the New York when the latter was on her starboard bow and side.

8th. In attempting to keep out of the way by giving signal of two blasts and crossing her bows instead of passing her by giving a signal of one blast and by going under her stern.

9th. In not blowing proper passing signals.

10th. In not stopping and backing when her passing signal was not answered.

11th. In not earlier blowing an alarm whistle.

12th. In attempting to pass the New York in the immediate proximity of the last barge and in the narrow channel left by said barge at the time of said collision.

Sixth. That by reason of the said collision the propeller New York has sustained damages to her stem and other parts of her forward.

Seventh. That said collision occurred without any fault or negligence of those in charge of the said propeller New York.

Eighth. That all and singular the premises are true.

Wherefore claimant prays that the libel herein may be dismissed with costs, and for such other and further relief and redress as in law and justice claimant is entitled to receive.

THE UNION STEAMBOAT COMPANY,
By WASHINGTON BULLARD,
General Manager and Director.

SCHUYLER & KREMER,
WILLIAMS & POTTER,
Proctors.

STATE OF NEW YORK,
Northern District of New York, County of Erie, } ss:

Washington Bullard, *who* being by me duly sworn, did depose that he is an officer, to wit, a director of The Union Steamboat Company, the claimant in the foregoing answer named. Said affiant further makes oath upon information and belief that said answer was in all respects true.

[SEAL.]

JOHN H. BROGAN,
Notary Public in and for Erie Co., N. Y.

11 THE ERIE AND WESTERN TRANSportation Company
vs.
THE PROP. NEW YORK, HER ENGINES, ETC. } On Libel for Collision. In Admiralty.

This cause now came on for hearing pursuant to assignment, and thereupon, on application of the claimant, leave is granted to file a cross-libel herein, which is now presented and filed, and thereupon the court hear the pleadings and the testimony in part, and the cause is continued for further hearing.

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

To the Honorable Henry H. Swan, judge of the district court of the United States for the eastern district of Michigan:

The cross-libel of the Union Steamboat Company against the propeller "Conemaugh," her engines, boilers, boats, tackle, apparel and furniture, alleges as follows:

First. That at the different times hereinafter mentioned, said cross-libellant was the sole owner of the propeller New York, her engines, boilers, boats, tackle, apparel and furniture, and that no other person or persons were the owners thereof.

Second. That on or about the 21st day of October, 1891, said propeller New York, being then and also at the time of the collision, tight, staunch and strong, and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts upon

the lookout for the safety of the said vessel, and having her side and bright lights properly stationed and burning brightly, was bound on a voyage from Buffalo, New York, to the port of Milwaukee, Wisconsin, laden with a cargo of general merchandise. That on the said day, between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh in the Detroit river, below the town of Sandwich, on the Canadian side of the river; that before and at the time of said collision, the propeller New York was bound up said river, and when nearing a point in said river below where the River Rouge
12 empties into the Detroit river, a steamer with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side light of her barges in tow, as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank and there not being room enough for any vessel to pass safely between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter, starboarded so as to go close under her stern. While passing under the stern of this barge and not more than ten or twenty feet from her, several short blasts of the whistle of the propeller—which proved to be the Conemaugh—were heard close at hand and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having
13 the tow, except the signal of two short blasts from the Conemaugh, and that when this was received, the New York was

close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could, with safety, pass her starboard side to starboard side, and if such manœuvre was attempted a collision could be best avoided by swinging clear under a hard-a-starboard helm.

Third. That cross-libellant is informed and believes that said collision was due entirely to the fault of those in charge of the navigation of the propeller Conemaugh, and charges that said propeller is at fault as follows:

1st. In not keeping a proper and sufficient lookout.

2nd. In being in charge of incompetent, reckless and negligent officers.

3rd. In not carrying the lights required by law brightly burning and properly displayed.

4th. In adopting a course which would take her into Canadian waters and on that side of the channel usually navigated by upbound steamers.

5th. In attempting to pass the New York starboard side to starboard side, instead of port side to port side.

6th. In changing her course in pursuance with such passing signals before receiving an assenting answer to such signals.

7th. In not keeping out of the way of the New York when the latter was on her starboard bow and side.

8th. In attempting to keep out of her way by giving a signal of two blasts and crossing her bows instead of passing her by giving a signal of one blast and going under her stern.

9th. In not blowing proper passing signals.

10th. In not stopping and backing when her passing signal was not answered.

11th. In not earlier blowing an alarm whistle.

12th. In attempting to pass the New York in the immediate proximity of the last barge in the narrow channel left by said barge at the time of said collision.

Fourth. That by reason of said collision said propeller New York was damaged on her stem and bow so that repairs became necessary, and that cross-libellants were damaged in the cost of repairs and detention of said vessel, amounting in all to the sum of three thousand dollars.

Fifth. That all and singular the premises are true.

Wherefore, cross-libellant prays that process in due form
14 of law may issue, if necessary, against the propeller Conemaugh, and that libellant herein may be ordered to file the usual stipulation and make answer according to the practice of the court, and for such other and further relief and redress in the premises as cross-libellant is entitled to receive.

THE UNION STEAMBOAT COMPANY,
By W. BULLARD, *Gen. Manager.*

SCHUYLER & KREMER,
Proctors for Cross-libellant.
H. C. WISNER, *Advocate.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

W. Bullard, being sworn, deposes and says that he is an officer, to wit, a director of The Union Steamboat Company, the claimant in the foregoing answer named. Said affiant did further make oath upon information and belief that said answer was in all respects true.

ROBERT T. GRAY,
Notary Public, Wayne County, Mich.

United States District Court for the Eastern District of Michigan.
In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY
vs.
PROPELLER NEW YORK and THE UNION STEAMBOAT COMPANY
vs.
PROPELLER CONEMAUGH, THE ERIE & WESTERN TRANSPORTATION CO.

Cross-libel. Before D. J. Davison, U. S. cir. ct. comm'r, on reference to ascertain damages.

It is hereby stipulated by and between the parties to the above causes that:

The proofs adduced by libellant on Oct. 23rd and 24th, 1895, at the hearing before said commissioner, of the loss and injury to the cargo of the steamer Conemaugh, by the collision with the New York, shall be deemed sufficient for the purposes offered, and shall be considered and received without objection.

15 And it is further stipulated that, in case the matter shall become material, either in this court or in the court of appeals, the loss suffered by the propeller New York in and by said collision, was the sum of $3,391.19, and the date of such loss shall be considered as the 1st day of November, 1891.

SCHUYLER & KREMER,
H. C. WISNER,
Proctors for Steamer New York.

Detroit, Jan. 25, '95.

HARVEY D. GOULDER,
Proctor for Steamer Conemaugh.
F. H. & G. L. CANFIELD,
For Intervening Underwriters on Cargo.

The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE STEAMER NEW YORK.

Messrs. Shaw & Wright and H. D. Goulder, for the Conemaugh.
C. E. Kremer, Esq., and H. C. Wisner, Esq., for the steamer New York.

Upon the hearing of this case, the court found both vessels at fault for the collision, and accordingly referred it to a master to ascertain and report the damages in the cause. The reasons given for that conclusion are stated in the case of the New York, 53 F. R., 553, and were reached, as there stated, with considerable doubt as to their correctness. A rehearing was had upon the petition of libellant and the matter was taken under advisement before the court. A careful re-examination of the testimony in the case, the admitted circumstances attending the collision and the rule of law applied by the Supreme Court of the United States, since the former decision of this cause, have satisfied me that in holding both vessels at fault, too harsh a judgment was passed upon the conduct of the master of the Conemaugh in holding that vessel in fault for the failure to stop and reverse, instead of going ahead at full speed in its efforts to escape the New York.

The answer and cross-libel filed by the owners of the New York says: "While passing under the stern of this barge (the Ferguson),
and not more than ten or twenty feet from here, several short
16 blasts of the whistle of the propeller, which proved to be the
Conemaugh, were heard close at hand and not more than one hundred feet away. The Conemaugh pursued her course directly across the bow of the New York, which was then swinging under a hard-a-starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm." This admission was not called to the attention of the court at the first argument of the cause, and although it states the distance between the vessels at the time of the alarm signals by the Conemaugh, at less than that found by the court, its significance is—whatever that distance may have been—that at the time those alarm signals were sounded, the collision was confessedly inevitable. The New York was ascending the river at a speed of ten miles an hour. The Conemaugh was running at half that speed, and up to this time, had been navigated with great circumspection. When these signals were sounded the vessels were probably not to exceed 1,200 feet apart, and would cover that distance in less than one minute, and in so doing, the former finding of this court was that the proofs "leave it at least doubtful whether the Conemaugh could have been stopped in time to avert the collision."

This conclusion—that is the doubt which it admits—require-

under the latest decision of the Supreme Court, the acquittal of the Conemaugh.

As found in the former opinion, there would have been no collision had not the New York unlawfully changed her course upon being apprised of the proximity of the Conemaugh. This error superadded to the many and flagrant prior faults of the New York's navigation, should be held solely responsible for this collision.

In the case of the City of New York, 147 U. S., page 85, the language of Mr. Justice Brown, who delivered the opinion of the court, is most opposite to the facts in this case. He there says—speaking of the collision between a steamer and a sailing vessel: "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.
17 There is some presumption at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel, should be resolved in its favor." While this doctrine is not new, and many cases are cited in the opinion filed in this cause, expressing the same rule of judgment, it is an application of that rule under circumstances much less excusatory of the acquittal vessel than those which mark the collision in this cause. While it is true, as stated in our former opinion herein, that the conditions preceding the New York's change of course, were preparatory and cautionary, and it was because of that fact that the Conemaugh was adjudged in fault for not stopping and reversing, in the light of all the circumstances and in view of the grossly negligent navigation of the New York when contrasted with the generally cautious management of the Conemaugh, and the perilous emergency in which the latter was placed by the wrong-doing of the New York, justice to the Conemaugh requires the application of the rule which I reluctantly declined to follow in the former opinion that where a vessel, which has been brought into immediate jeopardy by the fault of another, the injured party is not debarred from the recovery of damages if his vessel has done something wrong and has not been maneouvered with perfect skill and presence of mind. The proof of the Conemaugh's complicity in wrong-doing is not "clear and convincing" and she ought not to be held.

The case of the Alexander Folsom, 52 F. R., 403, is another instance of the application of the rule similar to that of the City of New York, 147 U. S., page 85, where the reasons for holding the error committed by one of the vessels in a collision as pardonable because in extremes were no more cogent that here.

This conclusion requires that the former decree in this cause be vacated and that a decree be entered herein, holding the New York solely in fault for the collision, and that the reference heretofore ordered in this cause be proceeded with for the ascertainment of libelant's damages, including the damages suffered by the petitioners,

who have intervened in the cause, and that the cross-libel of the owner of the New York be dismissed with costs.

(Signed) HENRY H. SWAN,
District Judge.

18 And afterwards on October 8th, 1894, a petition was filed in said court and cause in the following words and figures:

District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY
vs.
THE PROPELLER "NEW YORK;" THE UNION STEAMBOAT COMPANY, Claimant,

and

THE UNION STEAMBOAT COMPANY
vs.
THE PROPELLER "CONEMAUGH."

On libel and cross-libel.

To the Honorable Henry H. Swan, judge of said court:

The petition of the Insurance Company of North America, intervening for its interest in said cause, respectfully shows:

First. That it is a corporation existing under the laws of the State of Pennsylvania, and is now and at the times hereinafter mentioned was doing business as a marine insurance company in the States of Illinois, Wisconsin and Minnesota, and at different ports and places on the Great Lakes.

Second. That on or about the twenty-first day of October, 1891, the said propeller "Conemaugh" belonging to the said Erie & Western Transportation Company, while prosecuting a voyage from the port of Milwaukee to the port of Buffalo, and while passing down the Detroit river, was collided with and run into by the propeller "New York," and was by reason of said collision sunk, and the cargo which she had on board was greatly injured and damaged, and portions thereof lost.

Third. That on or about the eleventh day of November, 1891, the said Erie & Western Transportation Company filed its libel in this court in which it is among other things alleged that the aforesaid collision and the damage resulting therefrom to said propeller Conemaugh and her cargo was entirely due to the fault of those in charge of the navigation of the said propeller "New York" and that
19 said propeller New York was in fault among other things as follows:

1. In not keeping a proper and sufficient lookout.
2. In being in the charge of incompetent, reckless and negligent officers.
3. In adopting and pursuing the course she did until close to the

point where she would meet the Conemaugh, and then in departing violently to starboard from said course.

4. In changing her course a second time, and turning and swinging over into and against the Conemaugh.

5. In not passing clear on to the starboard side of the Conemaugh, or checking, stopping and reversing her engines, before her actions made the same necessary.

6. In that being the ascending vessel she maintained full speed up to and after the time she had altered her course, and in not checking her speed or stopping, if for any reason she found it necessary or advisable not to proceed on the course she had previously adopted.

7. In not answering the Conemaugh's signals, and in not giving the Conemaugh any signal whatever.

8. In disregarding the signals she had received from the Conemaugh.

As by reference to said libel will more fully appear. Upon information and belief your petitioner shows that the allegations of fault made in said libel are true.

Fourth. In said libel it is also alleged that the cargo of the Conemaugh by reason of said collision sustained damage to the amount of thirty thousand dollars, and that damage done to her hull together with the expenses of raising and saving her and her cargo amount to thirty thousand dollars, the aggregated damage claimed in said libel, including the loss sustained by the owners of said propeller and by the owners and insurers of her cargo being the sum of seventy thousand dollars.

Fifth. That process was issued against said propeller New York, and on the twelfth day of November, 1891, the Union Steamboat Company, her owner and claimant, appeared in said cause, and submitting itself to the jurisdiction of the court therein, filed its bond or stipulation in the sum of seventy thousand dollars, conditioned that if the said Union Steamboat Company, should well and truly appear and abide and answer the decree of the court in the aforesaid cause, without fraud or delay, then said obligation should be void, otherwise to remain in full force and virtue; which bond was duly approved, as by reference thereto in said cause will more fully appear.

Sixth. That on December fourteenth, 1891, said Union
20 Steamboat Company filed its answer in said cause, and that on the twenty-fifth day of February, 1892, the said Union Steamboat Company filed a cross-libel in said cause against the said propeller Conemaugh, alleging that said collision was due to the fault of those in charge of the navigation of the Conemaugh, and that afterwards said cause came on to be heard before the judge of said court, and on or about the thirty-first day of October, 1892, an interlocutory decree was entered in said cause, declaring that both of said vessels were in fault for said collision.

Seventh. That on or about November nineteenth, 1892, a petition for a rehearing in said cause was filed in behalf of the owners of said propeller Conemaugh, and the same was subsequently argued

and submitted, but no decision has been rendered thereon at the date of this petition.

Eighth. Your petitioner further shows that at the time of said collision there *was* on board the said propeller Conemaugh and forming a part of her cargo, 1475 barrels of flour marked "P. B." shipped by F. Fliegler, and consigned to the order of Neustadt & Co., New York, and 630 sacks of flour, marked "F. S.," shipped and consigned in like manner. That said 1475 barrels of flour were insured by your petitioner in the sum of $7400, that being the value of said flour, against the perils of the lakes, rivers, canals, fires and jettisons and all other perils that should come to the hurt, detriment or damage of said property or any part thereof, under a policy of insurance issued by your petitioner bearing date the fourth day of April, 1891, number 59, which policy is in ordinary form of lake cargo policies; and that said 630 sacks of flour were also insured by your petitioner in the same manner in the sum of $1950, that being the value of said sacks of flour under the same policy, as by reference to said policy and the endorsements thereon, and the certificates thereunder, will more fully appear, and to which your petitioner pray- leave to refer; that by reason of said collision, said flour was greatly injured and damaged and portions thereof lost and destroyed; that notice and proofs of loss *was* furnished your petitioner by the shippers and consignees of said flour, by whom said flour was abandoned to your petitioner, and the amount insured thereon as aforesaid, was paid by your petitioner to the consignees of said flour and that your petitioner thereby and by the terms and conditions of said policy, became subrogated to the rights of said shippers and consignees against any vessel or person whatsoever, on account of the injury and damage resulting to said
21 flour by reason of said collision, as will more fully appear by the subrogation receipts executed by said consignees to which your petitioner begs leave to refer.

Ninth. That at the time of said collision there *was* also on board of said propeller Conemaugh, 150 barrels of flour marked "P. B." shipped to Stanwich and Schober, to their own order, consigned to the city of New York, and that the same was insured by your petitioner in the sum of $865 against the perils of the lakes, rivers, canals, fires and jettisons, and all other perils or misfortunes that should come to the hurt or detriment of said property or any part thereof, as will more fully appear by a certain other policy of insurance issued by your petitioner, number 13, bearing date the first day of April, 1891, to which policy and the endorsements thereon and the certificates issued thereunder, covering said last-mentioned flour, your petitioner begs leave to refer.

Tenth. That said 150 barrels of flour *was* also by reason of said collision greatly injured and damaged; that notice and proofs of said loss were furnished to your petitioners by the shippers and consignees, by whom said flour was abandoned to your petitioner, and the amount insured thereon, which was the value of said flour, was paid by your petitioner to said consignees, and that your petitioner thereby and by virtue of the terms and conditions of said policy be-

came subrogated to all the rights of said shippers and consignees, against any vessel or person whatsoever on account of the injury or damage resulting to said flour by reason of said collision.

Eleventh. That at the time of said collision there *was* also on board said propeller Conemaugh 300 sacks of flour marked "White Satin," shipped by D. R. Barber & Son, consigned to Sprinkle & Badbeck, which was in like manner under said last-mentioned policy, insured by your petitioner against the perils hereinbefore enumerated, and that said 300 sacks of flour by reason of said collision were also greatly injured and damaged; that notice and proofs of loss were furnished by the consignees and shippers thereof to your petitioner, and that your petitioner under its said policy, paid to said shippers or consignees the sum of $84.93 on account of said loss and damage, and also paid $56.30 assessed in general average against said shipment in the adjustment of said loss, and thereby and under said policy became subrogated to all the rights of said shippers and consignees, as against any vessel or person whatsoever on account of the injury, and damage so resulting to said flour by reason of said collision.

22 Twelfth. That at the time of said collision there *was* also on board of said propeller Conemaugh, 150 barrels of flour marked "Amazon," shipped by D. R. Barber & Son, consigned to Sands, Pope & Taylor, which was also insured by your petitioner in the sum of $750 the value of said flour, under the said last-mentioned policy, and against the perils hereinbefore mentioned and that said one hundred and fifty barrels of flour, by reason of said collision were also injured and damaged; that your petitioner received notice and proofs of loss from the shippers and consignees, by whom the same was abandoned to your petitioner, and that your petitioner paid the amount insured to said Beltz & Brother, and thereby and by virtue of said policy, became subrogated to all the rights of said shippers and consignees against any vessel or person whatsoever on account of the injury and damage resulting to said flour by reason of said collision.

Thirteenth. That at the time of said collision there *was* also on board of said Conemaugh and forming a part of her cargo, 160 sacks of bran, marked "D. J. 200," shipped by Beltz Brothers, and consigned to their order in New York, which was also insured by your petitioner against the perils aforesaid and under said last-mentioned policy, in the sum of $238, being the value of said bran; that said bran was by reason of said collision greatly injured and damaged; that notice and proofs of loss were furnished to your petitioner, and that your petitioner paid the amount insured to said Beltz & Brother, and thereby and by virtue of said policy became subrogated to all their rights against any vessel or person whatsoever on account of the injury and damage resulting to said flour by reason of said collision.

Fourteenth. That there *was* also on board said propeller Conemaugh at the time of said collision, 575 barrels flour marked "Phenix," shipped by Stanwich & Schober, consigned to Beaty & Hay, New York, which was also insured by your petitioner in the

sum of $2830, the value of said flour, under the said last-mentioned policy, and against the perils hereinbefore specified; that said 575 barrels flour by reason of said collision were also greatly injured and damaged; that notice and proofs of loss were furnished to your petitioner by said shippers and consignees, by whom said 575 barrels were abandoned to your petitioner, and your petitioner paid the amount insured as aforesaid, on the same, and thereby and under the terms of said policy, became subrogated to all the rights of said shippers and consignees, against any vessel of persons whatsoever on account of the injury and damage resulting to said flour by reason of said collision.

23 Fifteenth. Your petitioner further shows that after the happening of the aforesaid losses by reason of said collision, efforts were made to save as much of said flour as possible, and such of said cargo as could be saved was sold and disposed of in a damaged condition, on account of the persons interested therein, and that *you* your petitioner has suffered a net loss by reason of the damaged condition of said flour, so insured by your petitioner as aforesaid, over and above the proceeds realized at said sale, in the sum of six thousand forty-nine dollars and seventy-three cents, which, with interest thereon, constitutes a lien against the propeller New York, her engines, &c., and for which amount both said propeller and her owner are liable to your petitioner, and that *as* underwriters having become subrogated to all the rights of the shippers and consignees of said flour hereinbefore mentioned, your petitioner is entitled to intervene in said cause and to prosecute its claim for the damage and injury done to said cargo and to recover for the same against the owners of said propeller "New York," and the sureties on the aforesaid bond or stipulation filed in said cause as aforesaid. A particular statement of said several shipments so as aforesaid insured by your petitioner, the sale and disposition of what was saved after said collision, and the losses resulting therefrom, is so set forth in Exhibit A, hereto annexed, to which reference is hereby made.

Your petitioner therefore prays that it may be allowed to intervene in said cause and to prosecute its claim on account of the damage done to said cargo by reason of said collision, as aforesaid. That said Union Steamboat Company, the claimant of said propeller New York may on a day fixed by the court, answer this petition, and that this court will decree that the said claimant and the sureties upon its aforesaid bond pay to your petitioner the loss and damage aforesaid with interest, and that the court will make such other and further order as shall be necessary to protect the just rights of your petitioner in the premises.

THE INSURANCE COMPANY OF NORTH AMERICA,
By F. H. & G. L. CANFIELD, *Its Proctors.*

F. H. & G. L. CANFIELD,
Proctors for Petitioner.

24 Afterwards, on the 24th day of October, 1894, an answer was filed in said court and cause, in the words and figures following, to wit:

In the District Court of the United States for the Eastern District of Michigan.

To the Honorable Henry H. Swan, judge of said court:

The answer of the Union Steamboat Company to the petition of the Insurance Company of North America, respectfully shows:

1st. That it admits the allegations of the first, second, fourth, fifth, sixth and seventh articles of said libel.

2d. That as to the third article of said libel, this respondent admits that the libel of the Erie & Western Transportation Company, filed on the 11th day of November, 1891, sets forth the allegations contained in said third article of said petition; but respondent denies that the allegations set forth in said libel and in the third article of said petition are true.

3d. That as to the matters contained in the eighth, ninth, tenth, eleventh, twelfth, thirteen-, fourteenth and fifteenth articles of said petition, this respondent has not sufficient knowledge to be able to deny or admit the same, and, therefore, demands strict proof of every part thereof material to said issue.

4th. And for a further answer to said petition said respondent alleges that it is in no way liable for the loss or damage sustained by the petitioner by reason of said collision; and for a fuller and more particular answer thereto, it refers to its answer heretofore filed in this cause.

5th. That all and singular the premises are true:

Wherefore, respondent prays that the petition herein may be dismissed with costs, and for such other and further relief as respondent is entitled to receive.

THE UNION STEAMBOAT CO.,
By THOMAS MORFORD, *Agent.*

SCHUYLER & KREMER,
Proctors for said Respondent.

STATE OF ILLINOIS, }
County of Cook, } ss:

On this 23d day of October, 1894, before me personally appeared T. T. Morford, the agent of the above-named respondent, who was sworn to the truth of the foregoing answer.

THOMAS MORFORD, *Agent.*

HARVEY LANTZ, [SEAL.]
Notary Public.

25 UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Michigan, Greeting:

Whereas lately in the district court of the United States for the eastern district of Michigan, before you, or some of you, in a cause between The Erie & Western Transportation Company, libellant, and The Propeller New York, her engines, etc., respondent, wherein a decree was entered in favor of said libellant and against the propeller New York, the Union Steamboat Company, claimant, as by the inspection of the transcript of the record of the said district court which was brought into the United States circuit court of appeals for the sixth circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said United States circuit court of appeals for the sixth circuit on said transcript of record and was argued by counsel;

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause *he* and the same is hereby reversed with costs, and the cause is remanded to the court whence it came, with directions to dismiss the libel of the owner of the Conemaugh and the petition of the intervening insurance companies and to enter a decree *in personam* in favor of the owner of the New York against the owner of the Conemaugh for the agreed damage to the New York.

You therefore are commanded that such proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of February, in the year 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

26 United States Circuit Court of Appeals for the Sixth Circuit.

PROPELLER "NEW YORK"
vs.
ERIE & WESTERN TRANSPORTATION COMPANY. } No. 461.

Oct. Term, 1897.

Statement of Costs.

Clerk's costs	$33 80
Cost printing record	331 46
Attorney docket fee	20 00
	$385 26

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the eastern district of Michigan, Greeting:

Whereas lately in the United States circuit court of appeals for the sixth circuit, in a cause between The Union Steamboat Company, claimant of the propeller New York, appellant, and The Erie & Western Transportation Company, libelant, and The British & Foreign Insurance Co., Limited; Insurance Company of North America; The Union Marine Insurance Company, and The Marine Insurance Company, Limited, intervening petitioners, appellees, wherein the decree of the said circuit court of appeals entered in said cause on the 5th day of October A. D., 1897, is in the following words: "This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Michigan, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be and the same is hereby reversed with costs, and the cause is remanded to the court whence it came, with directions to dismiss the libel of the owners of the Conemaugh, and the petition of the intervening insurance companies, and to enter a decree *in personam* in favor of the owners of the New York against the owners of the Conemaugh for the agreed damages to the New York," as by
27 inspection of the transcript of the record of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now ordered, adjudged and decreed

by this court that the decree of the said United States circuit court of appeals in the cause be and the same is hereby reversed; the claimants of the Conemaugh and the claimant of the New York each to pay one-half of all costs in this cause.

And that the said Erie & Western Transportation Company recover against the Union Steamboat Company, $276.75 for one-half of the costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the district court of the United States for the eastern district of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan.

Dec. 7th, 1899.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord, one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

28 The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Owner of the Propeller Conemaugh, Libelant; The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, Intervenors,

vs.

THE PROPELLER "NEW YORK;" THE UNION STEAMBOAT COMPANY, Complainant.

It is hereby stipulated that the losses sustained by the parties to this cause by the collision between the said propellers Conemaugh and New York, with interest to July 3, 1896, shown by the record in said cause, are as follows:

Erie & Western Transportation Company, owners of propeller Conemaugh	$30,508 46
Erie and Western Transportation Company, trustee for underwriters on cargo, other than intervenors	19,627 67
British and Foreign Marine Insurance Co., Ltd	2,421 84
The Insurance Company of North America	7,950 09
The Union Marine Insurance Company	8,553 06

The Marine Insurance Company, Limited.....	916 57
Union Steamboat Company, owners — propeller New York.....	4,341 80
Total losses.....	$74,319 49

HARVEY D. GOULDER,
Proctor for Libelant.
F. H. CANFIELD,
G. L. CANFIELD,
Proctors for Intervenors
CHAS. E. KREMER &
WISNER & HARVEY,
Proctors for Claimant.

Dated March 17, 1900.

29 The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Owner of the Propeller Conemaugh, Libelant; The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company and The Marine Insurance Company, Limited, Intervenors,
vs.
THE PROPELLER NEW YORK; THE UNION STEAMBOAT COMPANY, Claimant.

On reading and filing the mandate of the supreme court in this cause, bearing date the 22d day of January, in the year of our Lord one thousand nine hundred, and in obedience to said mandate and in consonance with the opinion of the supreme court herein, it is now ordered, adjudged and decreed that the said propeller Conemaugh and the said propeller New York, were both in fault for the collision set forth in the pleadings in this cause, and that the damages to said vessels and their owners resulting therefrom be equally divided between said Erie & Western Transportation Company and the said Union Steamboat Company;

And it is further ordered, adjudged and decreed, that the underwriters and owners of the cargo of said propeller Conemaugh recover the full amount of their damages against the said Union Steamboat Company and the American Surety Company of New York, its surety upon the bond or stipulation herein filed, with interest at the rate of seven per cent. per annum (that being the rate per annum that judgments and decrees bear in the courts of Michigan under the statute of said State), from the third day of July, 1896, until paid;

And it appearing that the above-named intervenors were insurers of portions of said cargo and that they have suffered damages on account of said collision, as follows, to wit:

The British & Foreign Marine Insurance Company, Limited, in the sum of.....	$2,421	84
The Union Marine Insurance Company, in the sum of.....	8,553	06
The Marine Insurance Company, Limited, in the sum of.....	916	57
The Insurance Company of North America, in the sum of.....	7,950	09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and its surety their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of seven per cent. per annum from the third day of July, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for said intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have executions therefor.

And it further appearing that the owners of said cargo and their underwriters, other than the intervenors, have suffered damage by said collision in the sum of $19,627.67, for which the said Erie & Western Transportation Company appears in this suit as tru-tee only, it is further ordered, adjudged and decreed that said trustee recover from the said Union Steamboat Co. and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of $19,627.67, with interest thereon at the rate of seven per cent. per annum from July 3, 1896, until paid, and that it have execution therefor.

And it is further ordered, adjudged and decreed that the said Erie and Western Transportation Company recover from the said Union Steamboat Company and its surety aforesaid, the sum of $13,083.33 (being one-half of the damage to said Conemaugh, less one-half of the damage suffered by the said New York in said collision), together with interest thereon at the rate of seven per cent. per annum from July 3, 1896;

And it is also decreed that the said libelant recover of the said claimant and its surety, $276.75, as one-half of the costs of said cause in the supreme court, and also one-half of all costs of said cause in this court and in the United States circuit court of appeals for the sixth circuit;

And it is further ordered that if default be made in the payment of any of said sums, executions issue therefor against the said claimant and its surety aforesaid.

HENRY H. SWAN,
District Judge.

31 Present: The Hon. Henry H. Swan, district judge.

THE ERIE AND WESTERN TRANSPORTATION COMPANY
vs.
THE PROPELLER "NEW YORK," HER ENGINES, etc. } In Admiralty.

On libel and cross-libel for collision.

It appearing to the court from the records in this cause that the clerk omitted to enter an order dismissing the cross-libel filed in said cause in accordance with the direction of the court, contained in its opinion filed herein on May 16, 1895, and that such omission was overlooked at the time by the court it is now, on motion of H. D. Goulder, proctor for original libelant, ordered, adjudged and decreed that said cross-libel be and the same is hereby dismissed in conformity with said opinion and that this order be entered as of the said 15th day of May, 1895, the date of the filing of said opinion, *nunc pro tunc*.

H. H. SWAN,
District Judge.

United States District Court, Eastern District of Michigan.

ERIE & WESTERN TRANSPORTATION COMPANY
vs.
PROPELLER "NEW YORK."

Now comes the Union Steamboat Company, claimant of the propeller New York, by C. E. Kremer, H. C. Wisner and F. C. Harvey, its proctors, and prays an appeal from the decree of this court entered in the above-entitled cause on the 24th day of March, A. D. 1900, and having filed its assignments of error, prays that the appeal may be allowed, and that it be permitted to give a stipulation in such amount as the court may deem just in the premises.

C. E. KREMER,
H. C. WISNER, AND
F. C. HARVEY,
Proctors for Union Steamboat Co.

32 In the District Court of the United States for the Eastern District of Michigan.

ERIE & WESTERN TRANSPORTATION COMPANY
vs.
STEAMER "NEW YORK."

That in the decision and decree of the court in the above-entitled cause, the court erred as follows, and claimants assign as errors:

First. That the court erred in entering a decree in favor of the several insurance companies intervening in said cause.

Second. That the court erred in allowing interest on the various

sums decreed to be due to the libelant and the intervenors at the rate of seven per cent. per annum.

Third. That the court erred in not permitting the Union Steamboat Company to offset or recoup any part of the damages paid on account of loss or the damage to the cargo of the steamer "Conemaugh," against the claim for damages sustained by the libelant as owner of the steamer "Conemaugh."

Fourth. That the court erred in decreeing the claimants to pay one-half of the costs of this cause in the United States circuit court of appeals for the sixth circuit.

Fifth. That the court erred in decreeing in favor of the libelant and intervenors to recover 76 & ½ per cent. of all the damages arising in said cause, instead of fifty per cent. or one-half of all such damages.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
Proctors for Appellant.

United States district court for the eastern district of Michigan. In admiralty. Erie & Western Transportation Company *vs.* Propeller New York. Assignment of errors. C. E. Kremer, H. C. Wisner, F. C. Harvey, proctors for appellant.

THE ERIE & WESTERN TRANSPORTATION COMPANY
vs.
PROPELLER "NEW YORK," HER ENGINES, &c.

On reading the written consent of Harvey D. Goulder, it is ordered that F. H. and G. L. Canfield be substituted as proctors
33 for the Erie and Western Transportation Company, as trustee for the underwriters on the cargo of the steamer Conemaugh, other than the underwriters who have already intervened in said cause.

HENRY H. SWAN,
District Judge.

Know all men by these presents, that we, the Union Steamboat Company, a corporation existing under the laws of New York, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the Erie and Western Transportation Company, the British and Foreign Insurance Company, Limited; the Insurance Company of North America, the Union Marine Insurance Company, and the Marine Insurance Company, Limited, in the sum of one hundred and five thousand dollars (105,000), to be paid to them or to their successors and assigns in the manner and amount to each, as indicated by the final decree hereinafter referred to, to which payment we bind ourselves and our successors, jointly and severally by these presents.

Dated this 21st day of June, A. D. 1900.

Whereas, the above-bounden Union Steamboat Company has ap-

pealed to the United States circuit court of appeals for the sixth circuit, from a decree of the district court of the United States for the eastern district of Michigan, in admiralty, bearing date March 24, 1900, in a cause in which the said Erie and Western Transportation Company was libellant, and the said British and Foreign Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, Limited, are intervening petitioners, and The Union Steamboat Company was claimant of the propeller New York, and respondent.

Now, therefore, the condition of this obligation is such, that if the above-named appellant, The Union Steamboat Company, shall prosecute its appeal with effect and shall answer and pay all damages and costs which may be decreed against it, including just damages for delay and costs and interest on appeal, in case it fails to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue. And the parties obligors hereto, do
34 agree that, in case of appellant's failure to make good its plea, proper and just decrees may be entered against them as shall be directed by the court.

UNION STEAMBOAT COMPANY, [SEAL.]
By E. B. THOMAS, *President*,
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By SYLVESTER J. SULLIVAN, *Manager*.

Attest: WYLLYS BENEDICT,
Attorney-in-fact.

A. R. MACDONOUGH, *Secretary*.

Sealed and delivered in presence of:

—— ——.

I hereby approve the sufficiency of the foregoing bond and of the sureties thereon.

H. H. SWAN,
District Judge.

Detroit, June 26, 1900.

The District Court of the United States for the Eastern District of Michigan. In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Libelant & Appellee,
vs.
THE PROPELLER NEW YORK, HER ENGINE, ETC.; THE UNION Steamboat Company, Claimant and Appellant.

EASTERN DISTRICT OF MICHIGAN, *ss*:

I, Darius J. Davison, clerk of the district court of the United States for the eastern district of Michigan, do hereby certify and re-

turn the foregoing to be a full and true transcript of so much of the record in the cause above entitled, as in my judgment refers to the matter specified in the claim of appeal filed in said cause, and also a full and true transcript of the entire record and files in said cause except the following, viz: The testimony taken on the reference to commissioner to assess libelant's damages; the report of the commissioner thereon; the intervening petitions of the British & Foreign Marine Insurance Company, Limited; the Union Marine
35 Insurance Company and the Marine Insurance Company, Limited, and the answers of the Union Steamboat Company to said petitions, all of said petitions and answers omitted being in all respects similar to the petition of the Insurance Company of North America and the answer of the Union Steamboat Company thereto, herewith returned, except as to names and amounts.

That I have compared the same with the originals of record and on file in my office and find it to be a true transcript of said originals and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in said district this 24th day of July, A. D. 1900.

[SEAL.] D. J. DAVISON, *Clerk.*

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

United States Circuit Court of Appeals for the Sixth Circuit.

To the Erie & Western Transportation Company, The Erie & Western Transportation Company, trustee, libellant; The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, intervening petitioners, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 24th day of July, next, pursuant to an appeal filed in the clerk's office of the district court of the United States for the eastern district of Michigan, wherein The Union Steamboat Company, claimant of the propeller New York, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fifth.

HENRY H. SWAN,
District Judge.

* Not exceeding 30 days from the day of signing.

36 STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 27th day of June, A. D. 1900, personally appeared before me, a notary public in and for said county, H. W. Larkins, and made oath that she delivered a copy of within citation to F. H. & G. L. Canfield, proctors for Erie & Western Transportation Company, trustee, and intervening petitioners, by handing the same to Frank H. Canfield, a member of said firm personally at their offices in the city of Detroit.

H. W. LARKINS.

Sworn to and subscribed before me this 27 day of June, 1900.

THOMAS DAVIES,
Notary Public, Wayne County, Mich.

I hereby acknowledge service of the within citation.
Detroit, June 27, 1900.

HARVEY D. GOULDER,
Proctor for The Erie & Western Transportation Company, Libelant.

37 And afterwards, to wit, on July 28, 1900, præcipe for appearance of counsel was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1899.

UNION STEAMBOAT CO.
vs.
ERIE & WESTERN TRANSPORTATION CO. } No. 889.

To the clerk of said court:

Please enter my appearance as counsel for the appellant.

C. E. KREMER.
H. C. WISNER.
J. C. HARVEY.

And afterwards, to wit, on September 25, 1900, a motion to dismiss appeal was filed, clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York," Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY ET AL., Appellees.
No. 889.

Notice of Motion.

To C. E. Kremer, Esq., Chicago, Ill.; F. C. Harvey, Detroit, Mich., proctors for appellant.

SIRS: You are hereby notified that the appellees have filed a motion in the United States circuit court of appeals for the sixth circuit to dismiss the appeal in above cause, for reasons stated in said motion, a copy of which is herewith served upon you; said motion will be brought on for hearing on the opening of court on October 2, 1900, or as soon thereafter as counsel may be heard.

H. D. GOULDER,
F. H. & G. L. CANFIELD,
Proctors for Appellees.

38 Service of above notice and receipt of copy of said motion and copy of brief in support of motion acknowledged this 24th day of September, A. D. 1900.

C. E. KREMER,
F. C. HARVEY,
Proctors for Appellant.

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York," Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION COMPANY, THE ERIE & Western Transportation Company, Trustee, Libellants, and The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, Limited, Intervenors and Appellees.

Now come the said Erie & Western Transportation Company, by H. D. Goulder, its proctor, and the said Erie & Western Transportation Company, trustee, and the said British & Foreign Marine Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, Limited, and The Marine Insurance Company, Limited, intervenors, by F. H. & G. L. Canfield, their proctors, appearing not generally but for the purpose of this motion, and move the court that the appeal in this cause, taken by the said Union Steamboat Company, be dismissed, and the said cause remanded to the district court of the United States for the eastern district of Michigan:

1. Because the said decree of the said district court is a joint decree against the said Union Steamboat Company and the said American Surety Company, of New York, and the said appeal is in behalf of the said Union Steamboat Company alone, said American Surety Company, of New York, not being a party thereto; and no order or judgment of severance has been made in said cause to enable the said Union Steamboat Company to appeal alone.

39 2. Because it appears that the decree of the district court, from which said appeal was sought to be taken, was entered in obedience to the mandate of the Supreme Court of the United States, and that this court is without jurisdiction to review such a decree on appeal.

3. Because said appeal was not taken within the time prescribed by law.

4. Because no order allowing said appeal was made by the said district court.

5. Because, as appears from the face of the record, said appeal was in other respects irregularly and illegally taken. This motion is based upon the record and files in said cause and upon a certificate of the clerk of the district court filed therein, a copy of which is hereto annexed.

H. D. GOULDER,
Proctor for Erie & Western Transportation Company.
F. H. & G. L. CANFIELD,
Proctors for Intervenors and for Erie & Western Transportation Company, Trustee, Appellees.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Darius J. Davison, clerk of the district court of the United States for the eastern district of Michigan, do hereby certify that said court adjourned *sine die* on the 4th day of June, one thousand nine hundred, as appears by the record of said court; that the March term of said court for said year commenced on the 6th day of March and ended on said 4th day of June.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 20th day of September, A. D. 1900.

[SEAL.] D. J. DAVISON, *Clerk.*

And afterwards, to wit, on October 2, 1900, the following order was made in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY
vs.
ERIE & WESTERN TRANSPORTATION CO.

The motion to dismiss in this cause was argued on behalf of the motion by Mr. F. H. Canfield and Mr. H. D. Goulder, and against the motion by Mr. C. E. Kremer, and submitted.

40 And afterwards to wit, on October 13, 1900, an order denying motion to dismiss was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNION STEAMBOAT COMPANY
vs.
ERIE & WESTERN TRANSPORTATION CO.

The motion to dismiss the appeal herein is denied.

And afterwards, to wit, on October 29, 1900, an opinion on motion to dismiss was filed, clothed in the words and figures as follows:

Opinion on Motion.

United States Circuit Court of Appeals for the Sixth Circuit.

Opinion on motion to dismiss appeal.

THE UNION STEAMBOAT CO., Claimant of the Propeller "New York," Appellant,
vs.
THE ERIE & WESTERN TRANSPORTATION Company *et al.*, Appellees.

No. 889. Appeal from the District Court of the United States for the Eastern District of Michigan.

Submitted October 2, 1900; decided October 13, 1900.

Before Lurton, Day, and Severens, circuit judges.

It appears from the record that a libel was filed by the appellee against the propeller "New York" to recover the damages sustained by the steamer "Conemaugh" and her cargo, by reason of a collision with the "New York." The Union Steamboat Company intervened as owner of the "New York," filed its answer denying all liability, and also gave a stipulation for the release of the propeller, which had been seized under process of the court, which stipulation was signed by the American Surety Company, as surety for the owner. There was a final decree, holding
41 the "New York" liable for all the damages. This decree was reversed upon appeal to this court, the "Conemaugh" being held alone at fault. 54 U. S. App., 248. A writ of certiorari was allowed by the supreme court, and the case again heard. That court held both the "New York" and "Conemaugh" to be at fault, but that the insurers of the "Conemaugh's" cargo, who had intervened, were entitled to recover their full damages against the "New York," notwithstanding the equal fault of the "Conemaugh." The cause was remanded to the district court with directions to enter a decree in accordance with the opinion of the supreme court. The opinion is reported in 175 U. S., 187.

Thereupon the district court, on the 24th of March, 1899, entered a decree that all the cargo damages should be paid by the "New York," and, in addition thereto, one-half of the damages sustained by the "New York." The appellant sought to recoup the decree in favor of the "Conemaugh" to the extent of one-half of the cargo damages recovered by cargo owners or their underwriters against the "New York." This relief the district court denied. Thereupon, appellants applied to the supreme court for a writ of mandamus compelling Judge Swan to grant such recoupment. The writ was denied, upon the ground that the mandate had not been disobeyed in that the question of the right of the "New York" to recoup one-half of the decree against her for cargo damages from the moiety of damages awarded to the "Conemaugh" was not passed upon or decided by the court. Thereupon, appellants prayed an appeal to this court from the decree of March 24, 1899, which was allowed. The matter now comes on to be heard upon the motion of the appellees to dismiss the appeal thus allowed.

LURTON, circuit judge, having made the foregoing statement of the case, delivered the opinion of the court:

"1. The first ground upon which the motion to dismiss the appeal is predicated is, because the American Surety Company did not join in the appeal and has never refused, upon notification, to join in the appeal.

"It is well settled that all parties against whom a joint judgment or decree is rendered must join in proceedings for review in an appellate court, or that it must appear that those who have not joined had notice of the application for the appeal or writ of error and refused or neglected to join therein. *Owings v. Kincannon*, 7 Peters, 399; *Masterson v. Herndon*, 10 Wall., 416; *Mason v. United States*, 136 U. S., 581; *Hardee v. Wilson*, 146 U. S., 179; *Davis v.*
42 *Trust Co.*, 152 U. S., 590. The principle is that the same controversy cannot come up in fragments. To make the doctrine applicable, the controversy must be one to which there are two or more parties jointly interested as parties to the same litigation. If the decree or judgment be joint in form, but in law or fact separable, the mere form of the decree will not make it such a joint decree as to require those nominally joined to unite in appellate proceedings. *Haurick v. Patrick*, 119 U. S., 156, 163.

"The decree complained of is, in substance, that the libelant, the Erie & Western Transportation Company, recover from the Union Steamboat Company, 'and the American Surety Company, its surety, upon the bond or stipulation herein filed,' etc., $13,083.33, being one-half of the damages to said 'Conemaugh,' less one-half of the damages suffered by the 'New York,' and $19,627.67, on account of owners and underwriters of the 'Conemaugh's' cargo, being the amount of cargo damages represented by the said libelant as trustee. Though joint in form, if in law or fact the decree is separable, it was not necessary that the surety company should join the Erie & Western Transportation Company in the particular appeal shown to have been allowed in this case. The stipulation upon which the

surety company became bound as surety was one entered into under section 911, Revised Statutes of the United States, and admiralty rule 21. Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant, and the liability may be enforced by 'judgment thereon against both the principal and sureties' at the time of rendering the decree in the original cause.

"The suit or controversy in this case was between the intervening owner or claimant of the 'New York' and the libelant and others intervening as cargo owners or cargo underwriters. To that controversy the surety upon the stipulation was not a party. Neither does the record indicate that any question arose touching the obligation of the surety company or in any way involving the terms of the stipulation bond. If any such question had been made, the surety would doubtless have a right to be heard, and to take an appeal from any decree affecting its liability. The case of *Ex parte Sawyers*, 21 Wall., 236, has been relied upon by appellees as supporting their motion. In that case a decree was sought in the circut court against the sureties upon an appeal bond executed upon an appeal allowed to the circuit court from the decree of the district court. The circuit
— had directed that the sureties show cause, if any they had,
43 why an execution should not issue against them. This they did, and the circuit court held that they were not liable upon this alleged stipulation. Antecedently there had been an appeal to the supreme court, and the refusal of the circuit court to issue an execution against the appellants' sureties upon the appeal bond mentioned occurred after the original decree of the circuit court had been affirmed by the supreme court and the cause remanded. Upon the refusal of the circuit court, proceeding under the mandate of the supreme court, to order execution against the sureties aforesaid, an application was made to the supreme court to compel the circuit court to order an execution against the sureties in the stipulation. A mandamus was refused, because the supreme court had simply affirmed the decree of the circuit court, and had given no instructions touching anything which remained to be done. The circuit court was, therefore, left free to determine for itself what was thus required. The decree of the circuit court which had been affirmed had not unconditionally ordered an execution to issue and some action was, therefore, necessary, before any could issue. When the action of the circuit court was invoked in this respect the court declined to order execution because it was of opinion that the sureties were not liable under their sipulation. The action of the circuit court was, therefore, subject to review only by appeal and not by mandamus.

"It is true that the court does add that 'the sureties upon the stipulation are entitled to an appeal from any decree that may be rendered against them;' and that 'a decree agaist the principal respondents does not necessarily include them.' But this language must be interpreted in the light of the facts which the court was then dealing with. The question there was not one arising upon the doctrine of summons and severance, nor did it arise upon such

a bond as is here involved. But more important, still, is the fact that the court was then dealing with a case where it appeared that a question had actually arisen as to the liability of the sureties upon this stipulation. This was a matter wholly extraneous to the matters in controversy between their principal and the appellants, and was a controversy to which they were parties, and, therefore, entitled to an appeal. The very question presented by the motion now under consideration arose in the circuit court of appeals for the fourth circuit, in the case of '*The Glide*,' reported in 24 C. C. A., 46, and 72 Fed. Rep., 200.

"It was there held that the sureties upon a stipulation bond for the release of the vessel were in no such sense parties to the
44 controversy as to require that they should be joined in an appeal taken by the owner of the vessel whose sureties they were. Upon principle, this must be so. Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is 'a pledge or substitute for the property proceeded against,' and the sureties are not parties to the suit nor entitled to interfere in any way with the management of the suit. Williams & B. Ad. Jurisdiction, p. 286; *Lane v. Townsend*, Fed. cases, No. 8054.

"Unless some extraneous question arises involving the scope or obligation of the sureties in such a bond, they are not necessary parties to an appeal taken by any of the parties to the record. We have also been referred to the case of *Estis v. Trabue*, 128 U. S., 225, as supporting the contention of the appellees. That case did not involve such stipulation as is here in question. The sureties there held to be affected by the decree were sureties upon a 'forthcoming bond,' executed in an attachment proceeding by claimants who intervened as the owners of the property attached for the debt of another.

"Neither is the case of *The Grand Island & W. C. R. Co. v. Sweeny*, 103 F. R., 342, in point, for that was a case arising under a mechanics' lien statute, which required the plaintiff to make all persons claiming liens against the same property parties defendant to an action for the foreclosure of the lien claimed where the plaintiff claims such liens to be inferior to his own. It was there held that all persons so made defendants should be notified to join in an appeal taken by the principal defendant from a decree which forever bound and foreclosed every such claim in the property in question. The effect of such a decree was to cut off or subordinate the liens claimed by the parties made defendants as claiming liens in the same property, and to prevent separate appeals involving the rank of the plaintiff's lien it was proper they should join, or refuse on notice, in an appeal by the principal defendant, the common debtor. We fail to see any greater reason for regarding the stipulators' surety in such a bond as necessary parties to an appeal than there is for regarding the sureties in a cost bond as parties to the controversy. In both cases the principal controls the litigation and the sureties are bound by the result. In both cases if a question arises as to the obligation of the surety, the latter, to the extent of this in-

terest, should be heard, and for this purpose might appeal. Undoubtedly, if the suit is upon a bond and the judgment is
45 against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject-matter of the litigation. To this class of cases the case of *Estis v. Trabue* belongs.

"2. The decree appealed from was entered March 24, 1900. This appeal was taken within six months thereafter. Section 11 of the act of March 3, 1891, under which this court was organized, provides 'that no appeal or writ of error by which any judgment or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out, except within six months after the entry of the order, judgment or decree ought to be reviewed. Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit court of appeals.' The contention is that a 'lesser time' for appeals was by law allowed when this act was passed, and that such 'lesser time' applies to appeals in admiralty causes. This contention is based on the forty-fifth admiralty rule. But that rule applied only to appeals from the district to the circuit court and had no application to appeals from the circuit court. The appellate jurisdiction of the circuit court was abolished by section 4 of the act of 1891, and this court has been given the appellate jurisdiction formerly vested in the supreme court in admiralty cases. The only law limiting the time within which an appeal may be taken in admiralty cases from the circuit court is that prescribed by the eleventh section of the act of 1891. The appeal was, therefore, taken in time.

"3. It is next urged that the decree below was entered in obedience to the mandate of the supreme court, and is, therefore, not subject to review by this court, and that the appeal should, therefore, be dismissed.

"The appellant petitioned the supreme court to require the district court to enter a decree in accordance with its opinion and mandate, by allowing the 'New York' to recoup the decree in favor of the 'Conemaugh' to the extent of one-half of the cargo damages recovered against the 'New York,' the 'Conemaugh' being equally at fault. This relief was denied upon the ground that 'no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the "Conemaugh" was made by counsel or passed upon by the court.' *Ex parte The Union Steamboat Company*, 178 U. S., 317, 320.

46 "The supreme court further said that 'under the cases of *The "Albert Dumois,"* 177 U. S., 240, and *The "Chattahoochee,"* 173 U. S., 540, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of the "New York," and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus.'

"If this was a new question left open by the mandate and opinion of the supreme court, the district court was at liberty to consider

and decide the question of recoupment entirely unaffected by the mandate, and the action of that court in allowing or denying such recoupment is open to review in this circuit court of appeals only. *Mason v. Pewabic Mining Co.*, 153 U. S., 361.

"The motion to dismiss the appeal is denied."

And afterwards, to wit, on March 6, 1901, an entry was made upon the journal of said court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION STEAMBOAT CO. *vs.* ERIE & WESTERN TRANSPORTATION CO.	Appeal from the District Court of the United States for the Eastern District of Michigan.

Before Judges Lurton, Severens, and Clark.

This cause is argued on behalf of appellant by Mr. C. E. Kremer and by Mr. F. H. Canfield for the owners of the cargo and by Mr. Harvey D. Goulder for the Erie & Western Transportation Company, and the further hearing is continued until tomorrow.

47 And afterwards, to wit, on March 7, 1901, a further entry was made upon the journal of said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Before Judges Lurton, Severens, and Clark.

UNION STEAMBOAT CO.
vs.
ERIE & WESTERN TRANSPORTATION CO.

This cause is argued this day by Mr. H. D. Goulder for steamer "Conemaugh" and by Mr. C. E. Kremer for appellant, and is submitted.

And afterwards, to wit, on March 14, 1901, a motion for writ of mandamus, etc., was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION STEAMBOAT COMPANY, Claimant of Propeller "New York," Appellant, *vs.* ERIE & WESTERN TRANSPORTATION COMPANY ET AL., Appellees.	No. 889.

And now comes the said Union Steamboat Company, by C. E. Kremer and F. C. Harvey, its proctors, and suggests to the court a

diminution of the record in said cause, and prays that a citation may issue to the district court of the United States for the eastern district of Michigan, directing it to send to this court and file in this cause a draft of a decree submitted by the proctors of the Union Steamboat Company to the said court on the 17th day of March, 1900, and now on file in the clerk's office of the Supreme Court of the United States in the above-entitled cause, or in lieu thereof a copy of said draft of decree, a copy of which is attached to and made a part of this motion.

Appellant further moves the court that a copy of a petition for a writ of mandamus, an order to show cause issued upon the same, and the return or answer of the district judge to the same, in a proceeding in the Supreme Court of the United States, in the above-entitled cause, a certified copy of which is now in the files of
48 this court in the above-entitled cause, may be made a part of the record in the above cause.

Appellant further moves the court that it may be allowed to take the testimony of Mr. Frederick C. Harvey, one of the proctors for the appellant, and prove by him, if necessary, the fact that the said draft of the said decree was submitted to the judge of the said district court in the above-entitled cause on the 17th day of March, 1900, and that said court was requested to enter the same, and in support of said motion an argument was made and a brief submitted.

That this motion is based upon the records and files in said cause and upon the affidavit of Charles E. Kremer, a copy of which is hereto attached.

C. E. KREMER,
F. C. HARVEY,
Proctors for Union Steamboat Co.

United States Circuit Court of Appeals for the Sixth Circuit.

UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York,"
vs.
ERIE & WESTERN TRANSPORTATION COMPANY ET AL. } No. 889.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Charles E. Kremer, being duly sworn, deposes and says that he is one of the proctors for the appellant, The Union Steamboat Company, in the above-entitled cause; that on the 17th day of March, 1900, there was a hearing in this cause before the Honorable Henry H. Swan, judge of the district court of the United States, for the eastern district of Michigan, upon the motion of the libellant, The Erie & Western Transportation Company, to enter a decree in accordance with the terms of the mandate of the Supreme Court issued in the above cause.

That affiant, at that time, was proctor for the respondent, The

Union Steamboat Company, together with Mr. Frederick C. Harvey, and on the hearing of the said cause there was presented to the trial judge a draft of a decree, and this was accompanied by an argument and a brief citing authorities, and at the conclusion of the hearing the trial judge took under advisement the said cause, and re-
49 ceived from affiant the draft of the decree, together with a draft of a decree offered by libelant.

That on or about the 24th day of March, 1900, the said court entered the decree found in the record of the above-entitled cause. That thereafter, and on the 23d day of April, 1900, the Supreme Court of the United States, at the prayer of the Union Steamboat Company, contained in a petition for a writ of mandamus directed to the district court of the United States for the eastern district of Michigan, issued an order to show cause to the judge of the district court, an answer to which under date of May 2, 1900, was made by the Honorable Henry H. Swan, judge of said court, and in the said answer of the said judge, in paragraph 3 thereof, the said judge states that at the time of the hearing of the said cause the Union Steamboat Company submitted a proposed decree, which they prayed might be entered, and a copy of which is attached to the said answer of the said judge, entitled "Exhibit X."

Affiant further states that on the 2d day of October, 1900, a motion to dismiss the appeal in this cause came on to be heard, which said motion was overruled. That at the time the said motion for dismissing the said appeal was made there was filed in this court a copy of a certified copy of the petition of the Union Steamboat Company, filed in the United States Supreme Court, for a writ of mandamus, the answer of the district judge, and the order to show cause, which were used upon the hearing of the dismissal of this cause, and which affiant believes were then made a part of the record in the same.

Affiant further states the neither upon the hearing to dismiss the appeal or upon the hearing of this cause did the proctors for respondent and intervenors raise any question as to the deficiency in the record, but both hearings proceeded upon the record filed in this cause.

Affiant further states that said record does not contain the said draft of the said decree submitted to the said district court on the 17th day of March, 1900, and affiant is informed that the original draft was by said district court attached to the answer filed with said district court in this cause in the Supreme Court of the United States when it made its return to the order to show cause, to wit, on the 2d day of May, 1900. That at the time of the making up of the record in this cause the said proposed draft of a decree was, therefore, not on file in the said district court, but was on file in the clerk's office of the Supreme Court of the United States; no copy thereof was retained by the district court in its files in the
50 said cause in said court, and not being in the files or on file, or in the court, it was not incorporated in the record in this cause.

Affiant further states that upon due notice to the proctors for the

libellant and intervenors he made a motion in the district court of the United States for the eastern district of Michigan on the 11th day of March, 1901, asking the court to file *nunc pro tunc* a copy of the said draft of a decree filed in the Supreme Court of the United States, but the said district court declined to do so, claiming that this case was pending in this court and that it had no jurisdiction to enter such an order.

CHARLES E. KREMER.

Subscribed and sworn to before me this 13th day of March, 1900.
[SEAL.] ROBERT J. FOLONIE,
Notary Public.

The District Court of the United States for the Eastern District of Michigan.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Owner of the Propeller "Conemaugh," Libelant; The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, Intervenors,
vs.
THE PROPELLER "NEW YORK;" THE UNION Steamboat Company, Claimant.
} In Admiralty.

On reading and filing the mandate of the Supreme Court in this cause, bearing date January 22, 1900, and in obedience to said mandate, and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said propeller "Conemaugh" and the said propeller "New York" were both at fault for the collision set forth in the pleadings in this cause, and that the damages resulting therefrom to the said libellant, the owners of the cargo of the "Conemaugh" and underwriters
51 thereon, the intervening petitioners, and the claimant of the propeller "New York" be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the damages resulting from the said collision, together with interest thereon to July 3, 1896, amount to the sum of $74,319.49 and are payable to the following-named and in the following proportion, viz:

Union Steamboat Company, damage to "New York".....	$4,341.80
Erie & Western Trans. Co., damage to "Conemaugh".....	30,508.56
Erie & Western Trans. Co., trustee for owners of cargo and underwriters other than intervenors.....	19,627.67
British & Foreign Marine Ins. Co., Lim., intervenors.....	2,421.84
Union Marine Insurance Company.....	8,553.06
Marine Insurance Company, Limited.....	916.57
Insurance Company of North America.....	7,950.09

And it appearing that the above-named intervenors were insurers of portions of the cargo of the "Conemaugh" and that they have suffered damages on account of said collision, as follows, viz.:

British & Foreign Insurance Co	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and the American Surety Company, its surety, their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of 5 per cent. per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have execution therefor.

And it further appearing that the Erie & Western Transportation Company, as trustee for the underwriters and owners of the cargo of the "Conemaugh," has suffered damage by the said collision in the sum of $19,627.67, and that the Erie & Western Trans-
52 portation Company as owner of said propellor "Conemaugh," has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company for itself, and as trustee, recover from the said Union Steamboat Company and its surety one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56 hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer "Conemaugh," amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer "New York," amounting to the sum of $12,976.38, with interest thereon at the rate of 5 per cent. per annum, from July 3, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court or to the proctors for said Erie & Western Transportation Company the said sum of $12,976.38, with interest as aforesaid, and that in default thereof that it have execution therefor.

It is further ordered, adjudged and decreed that the said Erie & Western Transportation Company recover from the Union Steamboat Company and its surety the sum of $84.12, being one-half of the costs of the supreme court; $276.75, less one-half of the costs of the circuit court of appeals, $192.63, and further that said Erie & Western Transportation Company do recover from the Union Steamboat Company and its surety one-half of the costs in this court to be taxed, and that in default in the payment of any of said sums that the said Erie and Western Transportation Company have executions therefor against the said Union Steamboat Company and the American Surety Company.

53 And afterwards, to wit, on April 2, 1901, a decree was entered in said cause which reads and is as follows:

Decree.

United States Circuit Court of Appeals for the Sixth Circuit.

UNION STEAMBOAT COMPANY, Claimant of the Propeller "New York," *vs.* ERIE & WESTERN TRANSPORTATION COMPANY.	No. 889. Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be, and the same is hereby affirmed, with costs, in all respects, except as to the taxation of costs of the United States circuit court of appeals; in this respect only the decree below is reversed.

54 And afterwards, to wit, on April 5, 1901, an opinion was filed in said cause, which reads and is as follows:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

THE UNION STEAMBOAT CO., Claimant of the Propeller "New York," Appellant, *v.* THE ERIE & WESTERN TRANSPORTATION CO. *et al.*, Appellees.	No. 889. Appeal from the District Court of the United States for the Eastern District of Michigan.

Submitted March 7, 1901; decided April 2, 1901.

Before Lurton and Severens, circuit judges, and Clark, district judge.

In October, 1891, a collision occurred in the Detroit river between the steamers "Conemaugh" and "New York," which resulted in the sinking of the "Conemaugh," the total loss of her cargo, and in a slight loss to the "New York."

The Erie & Western Transportation Company, as owner of the "Conemaugh" and as bailee of her cargo, filed a libel in the district court against the propeller "New York" to recover the damages sustained by the "Conemaugh" and for the damages to her cargo.

The Union Steamship Company, as claimant and owner of the "New York," gave a stipulation for the release of the vessel and filed an answer denying all liability for the collision and alleging that the steamer "Conemaugh" was solely at fault.

Subsequently, by leave of the court, the Union Steamboat Company filed its cross-libel *against the propeller "Conemaugh,"* to recover the sum of three thousand dollars alleged to be the damages sustained by the "New York," in the said collision with the "Conemaugh."

This cross-libel prayed process, but none issued, and no answer was ever filed thereto. Upon the reference to a commissioner to ascertain damages it was, among other things, stipulated, "that
55 "in case the matter shall become material, either in this court "or in the court of appeals, the loss suffered by the propeller "'New York,' in and by said collision, was the sum of $3,391.19," as of November 1, 1891.

After the litigation had been started and at different dates various underwriters upon the "Conemaugh's" cargo intervened and filed separate intervening petitions against the Union Steamboat Company as owner of the "New York," seeking to recover insurance paid by them on said cargo. The remainder of the cargo owners and underwriters continued to be represented by the Erie & Western Transportation Company as trustee or bailee of the cargo claimants.

Upon a final hearing the district court held the "New York" solely at fault and condemned her to pay all the loss sustained by the "Conemaugh" and all the damage to her cargo.

Upon appeal to this court that decree was reversed, the "Conemaugh" being held solely at fault, and a decree was directed against the owners of the "Conemaugh" for the stipulated loss sustained by the "New York" in said collision. 54 U.S. App., 248, and 56 U.S. App., 146.

The case was then taken to the Supreme Court upon *certiorari*, where the decree of this court was reversed, that court holding that both vessels were at fault, and that the loss to the vessels should be divided, but that the cargo owners or underwriters were entitled to recover their entire loss against the owners of the "New York," notwithstanding the "Conemaugh" might be also liable for the collision. The case was remanded for a decree in pursuance of the opinion of that court.

The case is reported under the style of "*The New York.*" 175 U.S., 187. The district court accordingly rendered a decree requiring the owners of the New York to pay all the damages sustained by the intervening cargo underwriters, aggregating $19,841.56, and that they should pay to the owners of the "Conemaugh," as trustee for the owners of the cargo and their underwriters "other than the intervenors," the further sum of $19,627.67, these two sums being the full loss sustained by the "Conemaugh's" cargo. The court also directed that the owners of the "New York" should pay to the owners of the "Conemaugh" the further sum of $13,083.33, "being one-half of the "damage of the said 'Conemaugh,' less one-half the damage suffered "by the 'New York' in said collision."

The Union Steamboat Company have assigned as error.

1st. That the court erred in not permitting the Union Steamboat

Company to offset or recoup any part of the damages paid on
56 account of loss or damage to the cargo of the steamer "Conemaugh," against the claim for damages sustained by the libelant as owner of the steamer "Conemaugh."

2d. That the court erred in allowing interest on the various sums decreed to be due the libelant and intervenors at the rate of 7 per cent.

3d. That the court erred in decreeing that the appellants should pay one-half of the cost of the cause in the circuit court of appeals.

LURTON, circuit judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. That the decree appealed from conformed in every particular to the mandate of the Supreme Court has been expressly adjudicated under a petition filed in that court, prior to this appeal, praying that court, by writ of mandamus, to compel the district court to set aside the decree here complained of and "to enter one dividing the damages equally, so that petitioner would not be decreed to pay more than one-half the total damages arising out of the collision between the 'New York' and 'Conemaugh,' with interest not exceeding 5 per cent. per annum."

This was denied, the court saying:

"The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the 'Conemaugh's' cargo, that they were entitled to a recovery to the full amount of their damages against the 'New York,' notwithstanding the 'Conemaugh' was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the 'New York.' It may be true that the decree holds the 'New York' liable for 76 per cent. of the entire damages and not 50 per cent., but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and upon the other hand if petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor. But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the 'Conemaugh' was made by counsel or passed upon by this court. It is now insisted that, under the cases of *'The Chattahoochee,'* 173 U. S., 540, and *'The Albert Dumois,'* 177
57 U. S., 240, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of the 'New York,' and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal.

"No disobedience of the mandate having been shown, the petition must be denied." *Ex parte Union Steamboat Co.*, 178 U. S., 317, 320.

Referring to the general rule and not particularly to the case in hand, the Supreme Court in the same opinion said:

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court."

Ibid., 319.

That this is the proper court to review the action of the district court in respect to matters open to it to consider and decide, as matter subsequent to and not concluded by the mandate of the Supreme Court, we had occasion to decide at a former day of this session in an opinion reported in 104 F. R., 561, under the style of "*The New York.*" See also *Mason v. Pewabic Mining Co.*, 153 U. S., 361.

For appellants it is contended that the question of recoupment could not come on for decision until it was determined that both vessels were at fault and until the cargo owners and underwriters had recovered their full damages from appellant, and that the district court had, therefore, when entering a decree under the mandate, the right to consider and decide whether or not appellant had then the right to recoup one-half of the cargo damages it was thereby condemned to pay from the moiety of damages awarded the "Conemaugh;" and that any error committed by the district court in denying or granting such recoupment may be reviewed here. To this view of the abstract question we are disposed to assent. But when and how was this matter of recoupment presented to the district court? The decree which the court did enter was in precise conformity to the mandate of the Supreme Court. The cargo underwriters having proceeded only against the "New York," were entitled to recover their full damages against it as the only vessel impleaded.

If the "New York" had availed itself of admiralty rule 59, as was done in the case of "*The Beaconsfield*," 158 U. S., 303, 307, and
58 brought in the "Conemaugh" as a vessel in fault which also ought to be proceeded against for cargo losses, the question of the liability of that vessel to cargo underwriters would have been presented and the cargo damages would have been divided, if it had been found that that vessel was also in fault for the collision and had no valid special stipulations in her bills of lading relieving her from liability to cargo underwriters.

But this course was not taken. By neither cross-bill, petition nor answer was this question of the "Conemaugh's" liability to cargo underwriters presented. Nor does it appear that the question of recoupment, now raised by an assignment of errors upon the decree of the district court, was ever presented to that court by any form of pleading. Since this case was heard, the appellant has applied for leave to supplement the record by adding to it a decree which they prepared and submitted to the district court as a decree in compliance with the mandate of the Supreme Court, whereby the entire losses were equally divided between the vessels. That proposed decree is the decree which the Supreme Court refused to compel the district court to enter when appellant applied to it for a writ of

mandamus. In substance the insistence of the Union Steamboat Company was, that a decree should go against it for $19,841.56 in favor of cargo underwriters, who had intervened for themselves, and a decree in favor of The Erie & Western Transportation Company, as trustee for cargo underwriters represented by it, for $12,976.38. That result was reached in this way:

Libellant recovers of "New York" one-half of the damages sustained by the "Conemaugh"	$15,254 23	
Recovers one-half of the amount sustained by it as bailee of the cargo	8,813 82	
		$24,068 06
Less one-half of amount of intervenors' damages paid to cargo intervenors by "New York"	$8,920 78	
Less one-half of amount of damages sustained by "New York"	2,170 90	
		11,091 68
		$12,976 38

While this plan avoided the necessity for an affirmative decree in favor of the appellant without any pleading asking such relief, it did so at the expense of the underwriters represented by the
59 appellee, whose claims aggregated $19,627.67, an amount exceeding the proposed decree in their favor by $6,651.29.

This was clearly and distinctly inadmissible, as not conforming to the mandate of the Supreme Court, which directed that a decree should go against the "New York" for the whole of the cargo damages, as the only vessel impleaded by cargo owners or underwriters. Such a decree was not in accordance with the mandate, as the Supreme Court expressly decided. 178 U. S., 317. The equal division directed by that court applied only to the vessels. No question of recoupment having been presented or decided by the Supreme Court, it was not competent for that court to compel the district court to enter a decree which was not required by its original decision. It is now sought to inject that proposed decree into this record as a basis for assigning as error the failure by the district court to allow recoupment in some form. The decree never was a part of the record in the court below, and the fact that it was ever proposed as a decree in compliance with the mandate of the Supreme Court can only be shown by evidence *de hors* the record. No pleading or oral application for recoupment, other than may be inferred from it, was ever made to the court below. It was submitted, not by way of an application to the power of that court over a matter subsequent to the mandate and not concluded, but as a decree required by the mandate. If it were here we could not regard it as an application for recoupment to be granted or refused on its merits as a matter subsequent to the mandate, but as an application based upon a misconception of the mandate. The application for a writ of *certiorari* is refused.

The right of set-off, or counter-claim, or recoupment, being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*.

It was not a defense which the appellant was obliged to then present. The mere fact that there are cross-demands will not operate as an estoppel if in fact the cross-demand was not presented and adjudicated.

A set-off or counter-claim is generally admissible in equity only when the circumstances are such as to justify the interference of equity to prevent injustice or avoid circuity of action.

Clearly it was not admissible to set off the decree in favor of the appellee as trustee for underwriters or cargo owners who had not intervened, by a claim against the appellee in a wholly different right. *Manhattan Insurance Co. v. McKown*, 33 C. C. A., 212.

60 Neither are we aware of any authority which would justify an affirmative decree upon a set-off in the absence of some pleading seeking such affirmative relief. "*The Dove*," 91 U. S., 381, 384; *Washington Rd. v. Bradley*, 10 Wall., 299; "*The Ethel*," 66 F. R., 140.

No issue having ever been made as to the liability of the "Conemaugh" to her cargo underwriters, it would seem altogether possible that an injustice might be done if it should be summarily assumed, that because she was found in fault and liable to the "New York" for one-half of her damages, that she is also liable to the underwriters upon her own cargo. Counsel for the "Conemaugh" say that there are special stipulations in her bills of lading which they write to set up against the claims of underwriters. Manifestly this court should not foreclose this defense upon a record which fails to show that any such right of set-off or recoupment was ever claimed or asserted in the court below or that the "Conemaugh" has ever been called upon to respond to the claims of her cargo underwriters. Not having been passed upon in the court of original jurisdiction, this court is not disposed to hold that the lower court erred in passing the matter over. *Harding v. Giddings*, 19 C. C. A., 508. *Lloyd v. Preston*, 146 U. S., 630. Neither do we think that innocent third parties should be longer delayed in the collection of cargo damages, by the delay incident to sending this case back for the purpose of allowing such pleadings as would properly present the question. The appellants not being obliged to assert their cross-demand or claim for contribution by way of recoupment in this cause did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the "Conemaugh." No special equity appearing, this will be no injustice. The motion to remand with leave to amend the pleadings is, therefore, denied.

2. We come, now, to the question of the rate of interest upon the decree allowed. The Supreme Court directed that the district court should enter a decree in conformity with the opinion, "with interest from July 3, 1896, until paid, at the same rate per annum that "decrees bear in the courts of the State of Michigan." In fixing 7

per cent. as the rate which decrees bear in the courts of Michigan, the learned district judge held that the 8th section of ch. 6 Revised Statutes of Michigan, 1838, as amended in 1855, was still in force. That section, as thus amended, has been carried forward into the various compilations of the Michigan statutes and appears
61 now among the laws in force as 4865 Compiled Laws of Michigan of 1897. This section reads as follows:

"Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of 7 per centum per annum; Provided, that on a judgment rendered or any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding 10 per centum."

The same section is also found in the Compiled Laws of 1857 as section 1317, and in the Compiled Laws of 1871 as section 1635, and in Howell's Statutes as section 1597. The contention is that this section of the old act of 1838 has been repealed, altered or amended so that the rate of interest on decrees is now 5 per cent.

The amounts involved being large and interest having started in July, 1896, the question is one of much importance to the parties. That the legal rate of interest, in the absence of contract on money and all forms of contract, is now 5 per cent., is conceded. That judgments and decrees should continue to bear 7 per cent. in Michigan, if true, is a curious anomaly. Odd as it may appear and harsh as may be the result, it is, nevertheless, a question depending upon the ordinary rule touching the repeal or amendment of laws by implication, for it is not pretended that there has been any express repeal or amendment of the statute we have set out.

Without the aid of a statute or the order or rule of the court, interest is not a legal incident of either judgments or decrees. *Creuze v. Hunter*, 2 Vesey, 157; *Perkins v. Fourniquet*, 14 How., 328; *Washington & Rd. v. Harmon*, 147 U. S., 571, 585.

Without the special provision made by the 8th section of the Michigan act of 1838, the general provision fixing the legal rate of interest, found in the 3d section of the same act, would not have applied to judgments and decrees.

The 3d section of the act referred to was in these words:

"The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or
62 shorter time. Provided, that in cases of money loaned it shall be lawful for the parties to stipulate in writing for the payment of any interest not exceeding 10 per cent. per annum."

This section was even carried forward as a distinct section in subsequent compilations of the laws and constitutes section 1594 of Howell's Statutes.

The act which it is supposed has amended or repealed the 8th section of the act of 1838 is an act passed in 1891 and found in

Michigan Session Laws of 1891, p. 197. That act and its caption is as follows:

"SEC. 1. An act to regulate the interest of money on account, interest on money judgments, verdicts, etc.

"The People of the State of Michigan enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding 8 per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due.

"SEC. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

This act was itself amended in 1899 so as to reduce the rate to 5 per cent. Act 207 Public Acts of 1899.

The repealing clause of the act of 1891 is limited to "all acts or "parts of acts contravening the provisions of this act."

Confessedly no act or part of an act is thereby repealed, unless it contravenes the provisions of the act of 1891. Though there are other acts which relate to the subject of interest, yet those acts must stand unless their provisions are repugnant to the later law.

Counsel for the appellees have called to our attention a number of special provisions of the law of Michigan relating to interest which were in force when the act of 1891 was passed. Thus, section 1195, Howell's Statutes, provides for interest on certain educational funds of the State, and section 1196 provides for interest on the university fund. This last section the supreme court of Michigan, in *University Regents v. Auditor General*, 109 Mich., 134, held, had not been affected by the act of 1891.

Besides these there are sections 3912 and 10470 of Howell's Statutes, one fixing a special rate for money due for delinquent
63 taxes, while the other provides for a special rate in judgments against incorporated banks.

To construe the act of 1891 as operating to fix the rate of interest at 5 per cent. upon all obligations requiring the payment of money, would alter, repeal or amend every one of the special acts above referred to, though it is plain that there is no necessary repugnance between those acts and the act of 1891.

Aside from the caption of this act of 1891, it could not be well supposed that the legislature intended to deal with interest upon judgments and decrees. That subject had always been regulated by special legislation without which neither judgments nor decrees would necessarily bear interest. The caption does refer to interest upon "judgments, verdicts, etc.," but the body of the act makes no more reference to such obligations than did the 3d section of the act of 1838, which was in substantially the same words. If the whole subject of interest on judgments and decrees was dependent upon this act of 1891, it is quite plain that neither would bear interest by virtue of its terms.

Neither does the caption refer to the subject of interest upon de-

crees as distinguished from judgments. The act of 1842, section 966, Revised Statutes of the United States, regulates the subject of interest upon *judgments*. This has been held not to apply to decrees. *Perkins v. Fourniquet*, 14 How., 328, 331; *Hagerman v. Moran*, 75 F. R., 99.

Much stress has, however, been laid upon the title of this act as indicating a purpose to include the subject of interest upon "judgments, verdicts, etc.," meaning thereby "decrees" as of like character with judgments.

While the title of an act should not be altogether ignored and may afford a key to unlock the meaning of a very doubtful statute, yet the title of an act cannot be used to extend the provisions of an act so as to include with its scope that which without such aid would plainly not be included. *Hayden v. Barney*, 5 Wall., 107; *Goodlett v. L. & N. R. Co.*, 122 U. S., 391, 408; *United States v. Palmer*, 3 Wheat., 610.

That the special provisions of the Michigan statutes in respect to interest upon judgments and decrees are not necessarily inconsistent with the provision for the reduction of the general rate of interest upon contracts implied or express and not reduced to judgments or decrees is to our minds very plain. The two subjects had always theretofore been regulated by distinct provisions of law.

The act of 1891 was plainly intended to displace the exist-
64 ing general law as embodied in the 3d section of the act of 1838, but we find no such repugnancy to the 8th section of the same statute as to justify us in holding that it has been repealed or amended by the later act. *State v. Stoll*, 17 Wall., 431; *Henderson's Tobacco*, 11 Wall., 652.

Section 8 of the act of 1838 was a special act dealing only with the subject of interest upon judgments and decrees, which, without such legislation, would not, as a legal incident, bear interest.

The act of 1891 may well be regarded as dealing only with the subject of interest as regulated by the 3d section of the same act of 1838. Though both section 8 of the act of 1838 and the act of 1891 deal with the subject of interest, yet they can both stand together without inconsistency.

In such circumstances neither a repeal nor amendment of the older act will occur by implication alone.

The purpose of the more general of the two acts relative to the same general subject is not necessarily repugnant to a different interest in regard to interest upon a particular class or kind of obligations. The purposes of the general rule in respect to legal interest in cases not particularly provided for may be effectuated without implying a change of intention in respect of particular matters specifically dealt with in prior legislation. Where two distinct acts relate to the same general subject, one will not repeal the other by implication unless the later act is plainly intended to cover the whole field or is manifestly repugnant to the older law. *Rogers v. N. C. & St. L. R. Co.*, 33 C. C. A., 517.

3. It is assigned as error that the district court decreed that the

appellants should pay one-half of all the costs of this cause "in the circuit court of appeals."

This was error, as those costs were included in the costs taxed in the Supreme Court and provided for by another part of the decree below.

The decree will in this respect be modified and in all other respects affirmed.

65 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Union Steamboat Co., claimant of the propeller "New York," *vs.* The Erie & Western Transportation Co. *et al.*, No. 889, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 30th day of April, A. D. 1901.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

66 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Union Steamboat Company, claimant of the propeller "New York," is appellant, and The Erie & Western Transportation Company *et al.*, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the eastern district of Michigan, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the

67 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the writ of certiorari within, I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, certify and herewith transmit a true copy of the printed record and all proceedings in a suit in which The Union Steamboat Company, claimant of the propeller "New York" is appellant, and The Erie & Western Transportation Company *et al.* are appellees, lately pending in the United States circuit court of appeals for the sixth circuit, under my hand and the seal of said court.

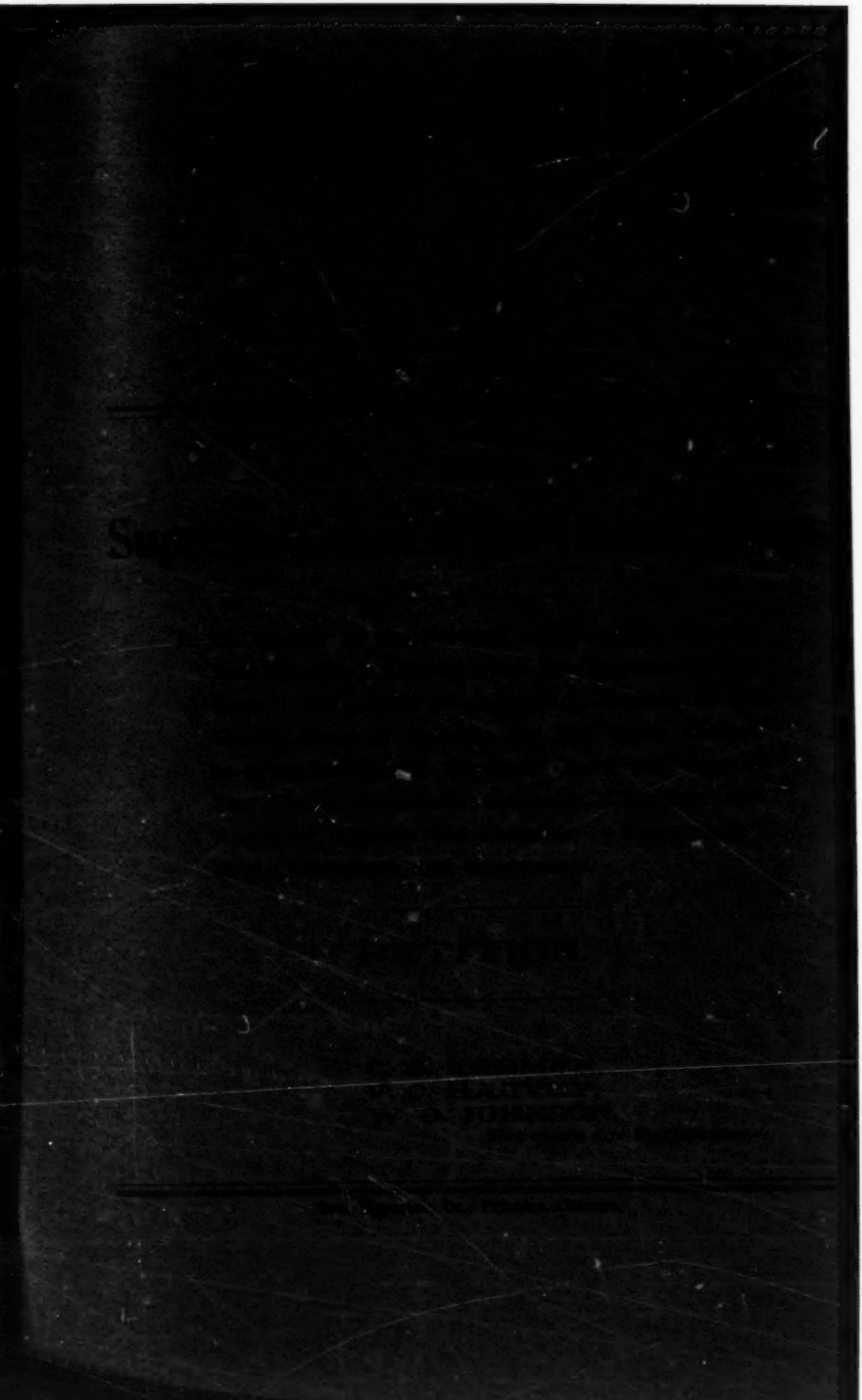
Witness my official signature and the seal of said United States circuit court of appeals for the sixth circuit at Cincinnati, Ohio in said circuit, this 8th day of July in the year of our Lord 1901.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals
for the Sixth Circuit.

68 [Endorsed:] File No. 18,159. Supreme Court of the United States. No. 674, October term, 1900. The Union Steamboat Co., claimant, &c. *vs.* The Erie & Western Transportation Co., *et al.* Writ of certiorari. Filed Jul- 5 1901 Frank O. Loveland, clerk.

Endorsed on cover: File No. 18,159. Supreme Court U. S. October term 1901. Term No. 97. The Union Steamboat Company claimant of the propeller "New York," petitioner, *vs.* The Erie and Western Transportation Company *et al.* Writ of certiorari & return. Filed July 10" 1901.



IN THE

Supreme Court of the United States

In the Matter of the Petition of The Union Steamboat Company, Claimants of the Steamer "New York," for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the Case of The Union Steamboat Company, Claimant and Appellant, against the Propeller "Conemaugh" et al., Claimants and Intervenors.

PETITION.

To the Honorable Judges of the Supreme Court of the United States:

The said petitioner respectfully shows to this court as follows:

I. That your petitioner, the Union Steamboat Company, is a corporation and the owner of the propeller "New York."

II. The case grows out of a collision which occurred on the 21st day of October, 1891, in the Detroit river between the steamers "Conemaugh" and "New York," which resulted in the sinking of the steamer "Conemaugh."

III. At the October Term, 1899, this case was decided by this court, and reported under the title of *The New York*, 175 U. S., 187.

IV. Thereupon, the mandate of this court was issued to the District Court under date of January 22d, 1900.

V. On the 17th day of March, 1900, the parties entered into a stipulation, which provided that the damages sustained by all the parties in the case should be as follows:

Erie & Western Transportation Company, owners of propeller "Conemaugh"	$30,508.46
Erie & Western Transportation Company, trustees for underwriters on cargo other than intervenors	19,627.67
British & Foreign Marine Insurance Co., Ltd	2,421.84
The Insurance Company of North America	7,950.09
The Union Marine Insurance Company	8,553.06
The Marine Insurance Company, Ltd.	916.57
Union Steamboat Company, owners propeller "New York"	4,341.80
Total	$74,319.49

VI. On the 24th day of March, 1900, the District Court, in pursuance of the mandate, entered a decree, under which the Union Steamboat Company, as the owner of the propeller "New York," was to pay all the damages sustained by the intervenors and by libelant as bailee of the cargo, making all of the cargo damage, and also pay one-half of the damages sustained by the "Conemaugh" herself, less the amount of the damage to the "New York," so that the Union Steamboat Company would pay 76½ per cent.

of all the damages in the case, instead of 50 per cent. of the same.

VII. That thereupon, the Union Steamboat Company filed its petition in the Supreme Court, praying for a writ of mandamus, directed to the Judge of the District Court, and ordering him to set aside the decree, and to enter a decree, which would hold the owners of the "New York" for but one-half of the amount of the damages, and the doing of which, after allowing the contribution, there would still be an affirmative decree in favor of the libelant, the owners of the "Conemaugh," for $12,976.38.

This court issued an order to show cause, and upon the hearing, upon the petition and answer of the District Judge and briefs of counsel, the court on May 28, 1900, decided the case now reported as *Ex parte Union Steamboat Company*, 178 U. S., 317.

VIII. That thereupon this petitioner prayed an appeal to the Circuit Court of Appeals for the Sixth Circuit, and a hearing upon this was had, and the Circuit Court of Appeals filed its opinion, affirming the decision of the District Court opinion marked "A" attached to this petition.

IX. The pleadings in this case in the District Court were:

1. A libel by the owner of the steamer "Conemaugh" on behalf of itself and as bailee for the amount of her cargo, against the propeller "New York" to recover the damages sustained by the "Conemaugh" and her cargo, arising out of a collision between the "Conemaugh" and "New York."

2. An answer by the "New York" denying all liability and charging the fault of the collision against the "Conemaugh."

3. A cross libel by the "New York" to recover the damages sustained by the latter in the same collision.

4. After a finding by the District Court that the "New York" was solely at fault, an intervening petition by underwriters who had assured a part of the cargo of the "Conemaugh" against the "New York" alone.

5. A finding holding the "Conemaugh" and "New York" both at fault for the collision.

X. The decision of the Circuit Court of Appeals, as it stands, is contrary to the law and practice in the Courts of Admiralty of the United States, and practically nullifies the well settled rule, that in all cases of collision, when two vessels are concerned and both are found at fault, that the damages arising out of the collision be equally divided between the owners of the respective vessels, each paying one-half of the sum.

XI. The decision of the Court of Appeals practically nullifies the well settled rule, that whenever one of the vessels at fault is compelled to pay the whole of the damages of a third or innocent party, any amount above a moiety of such damages, which shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value) pay one-half of all the damages arising out of the collision.

XII. The decision of the Court of Appeals practically holds (as petitioner is informed and believes contrary to law), that under the law and practice in the Admiralty Courts of the United States, it is necessary to bring a libelant into court as a co-defendant under Admiralty Rule 59, in case an intervening petition is filed by a cargo owner, who was included by the original party libelant and first came into

court through the original libel by the vessel owner suing for himself and as bailee of the cargo.

The Circuit Court of Appeals further holds that even when all of the parties are before the court, either as libelants or claimants, and the court finds libelants' and claimants' vessels both at fault, further proceedings on behalf of the claimants in the form of cross petitions or cross libels are necessary, before the court can grant recoupment and divide the damages equally when the damages are awarded to an innocent intervening cargo owner.

XIII. The Circuit Court of Appeals practically holds that it is absolutely necessary for the record on appeal from the District Court to the Circuit Court of Appeals to show that recoupment had been demanded by the pleadings or otherwise in the District Court, and thus disregarding the law, which provides a trial *de novo* in all cases of appeal from the District to the Circuit Court of Appeals.

The Circuit Court of Appeals also holds that the proposed decree on behalf of the "New York" would be at the expense of the underwriters represented by libelant, whose claims aggregated $19,627.67, an amount exceeding the proposed decree in their favor by $6,651.29, and that such a recoupment was not in conformity with the mandate of this court, and that this court refused to compel the District Court to enter this proposed decree in the mandamus proceedings taken in this court.

In this petitioner alleges the court is in error, because this court did not refuse to compel the District Court to enter any particular decree, but simply decided that if the decree was not in conformity with the mandate, the proper remedy was by appeal and not by writ of mandamus, and the entry of such a decree, petitioner alleges, would simply make the libelant account for his bailment without loss to

the bailor or to libelant, because the former would get the full amount of his damages, and the latter would pay but one-half of all the damages.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Sixth Circuit, to bring up this case to this Honorable Court for such proceedings as shall seem just.

..... Union Steamboat Co.
by B. E. Kremer
Proctor

United States of America,
~~State~~ ~~District~~ of ~~New York~~ Illinois, } ss.
County of ~~Erie~~ Cook }

.. Henry B. Ford ..... being duly sworn, deposes and says that he is the agent of the petitioner herein, the Union Steamboat Company; that said petitioner is a corporation; that deponent has read the foregoing petition and that the same is true to deponent's knowledge, information and belief, and deponent's knowledge is derived from the fact that he has been connected with petitioner in said litigation.

.. Henry B. Ford Agent

Subscribed and sworn to before me this 7th day of May, 1901.

(Notarial Seal)

Robert J. Folonie
Notary Public
Cook County
Ill

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petitioner should be allowed.

O. E. Kremer

F. G. Harvey

"EXHIBIT A."

No. 889.

UNITED STATES CIRCUIT COURT OF APPEALS,

SIXTH CIRCUIT.

The Union Steamboat Co., Claimant of the Propeller "New York," *Appellant*, v. The Erie & Western Transportation Co. *et al.* *Appellee.*	Appeal from the District Court of the United States for the Eastern District of Michigan.

Submitted March 7, 1901.
Decided April 2, 1901.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

In October, 1891, a collision occurred in the Detroit River between the steamers "Conemaugh" and "New York," which resulted in the sinking of the "Conemaugh," the total loss of her cargo, and in a slight loss to the "New York."

The Erie & Western Transportation Company, as owner of the "Conemaugh" and as bailee of her cargo, filed a libel in the District Court against the propeller "New York" to recover the damages sustained by the "Conemaugh" and for the damages to her cargo.

The Union Steamboat Company, as claimant and owner of the "New York," gave a stipulation for the release of the vessel and filed an answer denying all liability for the col-

lision and alleging that the steamer "Conemaugh" was solely at fault.

Subsequently, by leave of the court, the Union Steamboat Company filed its cross-libel *against the propeller "Conemaugh,"* to recover the sum of three thousand dollars alleged to be the damages sustained by the "New York," in the said collision with the "Conemaugh."

This cross-libel prayed process, but none issued, and no answer was ever filed thereto. Upon the reference to a commissioner to ascertain damages it was, among other things, stipulated, "that, in case the matter shall become material, "either in this court or in the Court of Appeals, the loss "suffered by the propeller 'New York,' in and by said col- "lision, was the sum of $3,391.19" as of November 1, 1891.

After the litigation had been started and at different dates various underwriters upon the "Conemaugh's" cargo intervened and filed separate intervening petitions against the Union Steamboat Company as owners of the "New York," seeking to recover insurance paid by them on said cargo. The remainder of the cargo owners and underwriters continued to be represented by the Erie & Western Transportation Company as trustee or bailee of the cargo claimants.

Upon a final hearing the District Court held the "New York" solely at fault and condemned her to pay all the loss sustained by the "Conemaugh" and all the damage to her cargo.

Upon appeal to this court that decree was reversed, the "Conemaugh" being held solely at fault and a decree was directed against the owners of the "Conemaugh" for the stipulated loss sustained by the "New York" in said collision. 54 U. S. App., 248, and 56 U. S. App., 146.

The case was then taken to the Supreme Court upon *cer-*

tiorari where the decree of this court was reversed, that court holding that both vessels were at fault, and that the loss to the vessels should be divided, but that the cargo owners or underwriters were entitled to recover their entire loss against the owners of the "New York," notwithstanding the "Conemaugh" might be also liable for the collision. The case was remanded for a decree in pursuance of the opinion of that court.

The case is reported under the style of *"The New York."* 175 U. S., 187. The District Court accordingly rendered a decree requiring the owners of the New York to pay all the damages sustained by the intervening cargo underwriters, aggregating $19,841.56, and that they should pay to the owners of the "Conemaugh," as trustee for the owners of the cargo and their underwriters "other than the intervenors," the further sum of $19,627.67, these two sums being the full loss sustained by the "Conemaugh's" cargo. The court also directed that the owners of the "New York" should pay to the owners of the "Conemaugh" the further sum of $13,083.33, "being one-half of the damage of the said 'Conemaugh,' less one-half the damage suffered by the 'New York' in said collision."

The Union Steamboat Company have assigned as error.

1st. That the court erred in not permitting the Union Steamboat Company to offset or recoup any part of the damages paid on account of loss or damage to the cargo of the steamer "Conemaugh," against the claim for damages sustained by the libelant as owner of the steamer "Conemaugh."

2d. That the court erred in allowing interest on the various sums decreed to be due the libelant and intervenors at the rate of 7 per cent.

3d. That the court erred in decreeing that the appellants

should pay one-half of the cost of the cause in the Circuit Court of Appeals.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. That the decree appealed from conformed in every particular to the mandate of the Supreme Court has been expressly adjudicated under a petition filed in that court, prior to this appeal, praying that court, by writ of mandamus, to compel the District Court to set aside the decree here complained of and "to enter one dividing the damages equally, "so that petitioner would not be decreed to pay more than "one-half the total damages arising out of the collision be- "tween the 'New York' and 'Conemaugh,' with interest not "exceeding 5 per cent. per annum."

This was denied, the court saying:

> "The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the 'Conemaugh's' cargo, that they were entitled to a recovery to the full amount of their damages against the 'New York,' notwithstanding the 'Conemaugh' was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the 'New York.' It may be true that the decree holds the 'New York' liable for 76 per cent. of the entire damages and not 50 per cent., but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and upon the other hand if petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor. But no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the

'Conemaugh' was made by counsel or passed upon by this court. It is now insisted that, under the cases of *'The Chattahoochee,'* 173 U. S., 540, and *'The Albert Dumois,'* 177 U. S., 240, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of the 'New York,' and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal.

"No disobedience of the mandate having been shown, the petition must be denied." *Ex parte Union Steamboat Co.,* 178 U. S., 317, 320.

Referring to the general rule and not particularly to the case in hand, the Supreme Court, in the same opinion, said:

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court."

Ibid., 319.

That this is the proper court to review the action of the District Court in respect to matters open to it to consider and decide, as matter subsequent to and not concluded by the mandate of the Supreme Court, we had occasion to decide at a former day of this session in an opinion reported in 104 F. R., 561, under the style of *"The New York."* See also *Mason* v. *Pewabic Mining Co.,* 153 U. S., 361.

For appellants it is contended, that the question of recoupment could not come on for decision until it was determined that both vessels were at fault and until the cargo owners and underwriters had recovered their full damages from appellant, and that the District Court had, therefore, when entering a decree under the mandate, the right to consider and decide whether or not appellant had then the right

13399

to recoup one-half of the cargo damages, it was thereby condemned to pay from the moiety of damages awarded the "Conemaugh;" and that any error committed by the District Court in denying or granting such recoupment may be reviewed here. To this view of the abstract question we are disposed to assent. But when and how was this matter of recoupment presented to the District Court? The decree which the court did enter was in precise conformity to the mandate of the Supreme Court. The cargo underwriters, having proceeded only against the "New York," were entitled to recover their full damages against it as the only vessel impleaded.

If the "New York" had availed itself of Admiralty Rule 59, as was done in the case of *"The Beaconsfield,"* 158 U. S., 303, 307, and brought in the "Conemaugh" as a vessel in fault which also ought to be proceeded against for cargo losses, the question of the liability of that vessel to cargo underwriters would have been presented and the cargo damages would have been divided, if it had been found that that vessel was also in fault for the collision and had no valid special stipulations in her bills of lading relieving her from liability to cargo underwriters.

But this course was not taken. By neither cross-bill, petition nor answer was this question of the "Conemaugh's" liability to cargo underwriters presented. Nor does it appear that the question of recoupment, now raised by an assignment of errors upon the decree of the District Court, was ever presented to that court by any form of pleading. Since this case was heard, the appellant has applied for leave to supplement the record by adding to it a decree which they prepared and submitted to the District Court as a decree in compliance with the mandate of the Supreme Court, whereby the

entire losses were equally divided between the vessels. That proposed decree is the decree which the Supreme Court refused to compel the District Court to enter when appellant applied to it for a writ of mandamus. In substance the insistence of the Union Steamboat Company was, that a decree should go against it for $19,841.56 in favor of cargo underwriters, who had intervened for themselves, and a decree in favor of the Erie & Western Transportation Company, as trustee for cargo underwriters represented by it, for $12,976.38. That result was reached in this way:

Libelant recovers of "New York" one-half of the damages sustained by the "Conemaugh"	$15,254 23	
Recovers one-half of the amount sustained by it as bailee of the cargo	8,813 83	$24,068 06
Less one-half of amount of intervenors' damages paid to cargo intervenors by "new York"	$8,920 78	
Less one-half of amount of damages sustained by "New York"	2,170 90	$11,091 68
		$12,976 38

While this plan avoided the necessity for an affirmative decree in favor of the appellant without any pleading asking such relief, it did so at the expense of the underwriters represented by the appellee, whose claims aggregated $19,627.67, an amount exceeding the proposed decree in their favor by $6,651.29.

This was clearly and distinctly inadmissible, as not conforming to the mandate of the Supreme Court, which directed that a decree should go against the "New York" for

the whole of the cargo damages, as the only vessel impleaded by cargo owners or underwriters. Such a decree was not in accordance with the mandate, as the Supreme Court expressly decided. 178 U. S., 317. The equal division directed by that court applied only to the vessels. No question of recoupment having been presented or decided by the Supreme Court, it was not competent for that court to compel the District Court to enter a decree which was not required by its original decision. It is now sought to inject that proposed decree into this record as a basis for assigning as error the failure by the District Court to allow recoupment in some form. The decree never was a part of the record in the court below, and the fact that it was ever proposed as a decree in compliance with the mandate of the Supreme Court can only be shown by evidence *de hors* the record. No pleading or oral application for recoupment, other than may be inferred from it, was ever made to the court below. It was submitted, not by way of an application to the power of that court over a matter subsequent to the mandate and not concluded, but as a decree required by the mandate. If it were here we could not regard it as an application for recoupment to be granted or refused on its merits as a matter subsequent to the mandate, but as an application based upon a misconception of the mandate. The application for a writ of *certiorari* is refused.

The right of set-off, or counterclaim, or recoupment, being in no way presented by any pleading in the case, was not so involved in the nature of the decree rendered as to make it error if the matter was passed *sub silentio*.

It was not a defense which the appellant was obliged to then present. The mere fact that there are cross de-

mands will not operate as an estoppel if in fact the cross demand was not presented and adjudicated.

A set-off or counterclaim is generally admissible in equity only when the circumstances are such as to justify the interference of equity to prevent injustice or avoid circuity of action.

Clearly it was not admissible to set off the decree in favor of the appellee as trustee for underwriters or cargo owners who had not intervened, by a claim against the appellee in a wholly different right. *Manhattan Insurance Co.* v. *McKown,* 33 C. C. A., 212.

Neither are we aware of any authority which would justify an affirmative decree upon a set-off in the absence of some pleading seeking such affirmative relief. *"The Dove,"* 91 U. S., 381, 384; *Washington Rd.* v. *Bradley,* 10 Wall., 299; *"The Ethel,"* 66 F. R., 140.

No issue having ever been made as to the liability of the "Conemaugh" to her cargo underwriters, it would seem altogether possible that an injustice might be done if it should be summarily assumed, that because she was found in fault and liable to the "New York" for one-half of her damages, that she is also liable to the underwriters upon her own cargo. Counsel for the "Conemaugh" say that there are special stipulations in her bills of lading which they write to set up against the claims of underwriters. Manifestly this court should not foreclose this defense upon a record which fails to show that any such right of set-off or recoupment was ever claimed or asserted in the court below or that the "Conemaugh" has ever been called upon to respond to the claims of her cargo underwriters. Not having been passed upon in the court of original jurisdiction, this court is not disposed to hold that the lower court erred in

passing the matter over. *Harding* v. *Giddings,* 19 C. C. A., 508. *Lloyd* v. *Preston,* 146 U.S.,630. Neither do we think that innocent third parties should be longer delayed in the collection of cargo damages, by the delay incident to sending this case back for the purpose of allowing such pleadings as would properly present the question. The appellants not being obliged to assert their cross demand or claim for contribution by way of recoupment in this cause did not do so. This leaves them free to assert their claim for contribution in an independent proceeding against the "Conemaugh." No special equity appearing, this will be no injustice. The motion to remand with leave to amend the pleadings is, therefore, denied.

2. We come, now, to the question of the rate of interest upon the decree allowed. The Supreme Court directed that the District Court should enter a decree in conformity with the opinion, "with interest from July 3, 1896, until paid, "at the same rate per annum that decrees bear in the courts "of the State of Michigan." In fixing 7 per cent. as the rate which decrees bear in the courts of Michian, the learned District Judge held that the 8th Section of Ch. 6 Revised Statutes of Michigan, 1838, as amended in 1855, was still in force. That section, as thus amended, has been carried forward into the various compilations of the Michigan Statutes and appears now among the laws in force as 4865 Compiled Laws of Michigan of 1897. This section reads as follows:

> "Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of 7 per centum per annum;

> Provided, that on a judgment rendered or any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding 10 per centum."

The same section is also found in the Compiled Laws of 1857 as Section 1317, and in the Compiled Laws of 1871 as Section 1635, and in Howell's Statutes as Section 1597. The contention is that this section of the old Act of 1838 has been repealed, altered or amended so that the rate of interest on decrees is now 5 per cent.

The amounts involved being large and interest having started in July, 1896, the question is one of much importance to the parties. That the legal rate of interest, in the absence of contract on money and all forms of contract, is now 5 per cent., is conceded. That judgments and decrees should continue to bear 7 per cent. in Michigan, if true, is a curious anomaly. Odd as it may appear and harsh as may be the result, it is, nevertheless, a question depending upon the ordinary rule touching the repeal or amendment of laws by implication, for it is not pretended that there has been any express repeal or amendment of the statute we have set out.

Without the aid of a statute or the order or rule of the court, interest is not a legal incident of either judgments or decrees. *Creuze* v. *Hunter*, 2 Vesey, 157; *Perkins* v. *Fourniquet*, 14 How., 328; *Washington* & *Rd.* v. *Harmon*, 147 U. S., 571, 585.

Without the special provision made by the 8th Section of the Michigan Act of 1838, the general provision fixing the legal rate of interest, found in the 3d Section of the same act, would not have applied to judgments and decrees.

The 3d Section of the act referred to was in these words:

> "The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time. Provided, that in cases of money loaned it shall be lawful for the parties to stipulate in writing for the payment of any interest not exceeding 10 per cent. per annum."

This section was even carried forward as a distinct section in subsequent compilations of the laws and constitutes Section 1594 of Howell's Statutes.

The act which is supposed has amended or repealed the 8th Section of the Act of 1838 is an act passed in 1891 and found in Michigan Session Laws of 1891, p. 197. That act and its caption is as follows:

> "Sec. 1. An Act to regulate the interest of money on account, interest on money judgments, verdicts, etc.
>
> "The people of the State of Michigan enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding 8 per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due.
>
> "Sec. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

This act was itself amended in 1899 so as to reduce the rate to 5 per cent. Act 207 Public Acts of 1899.

The repealing clause of the Act of 1891 is limited to "all acts or parts of acts contravening the provisions of this "act."

Confessedly no act or part of an act is thereby repealed,

unless it contravenes the provisions of the Act of 1891. Though there are other acts which relate to the subject of interest, yet those acts must stand unless their provisions are repugnant to the later law.

Counsel for the appellees have called to our attention a number of special provisions of the law of Michigan relating to interest which were in force when the Act of 1891 was passed. Thus, Section 1195, Howell's Statutes, provides for interest on certain educational funds of the state, and Section 1196 provides for interest on the University fund. This last section the Supreme Court of Michigan, in *University Regents* v. *Auditor General*, 109 Mich., 134, held, had not been affected by the Act of 1891.

Besides these there are Sections 3912 and 10470 of Howell's Statutes, one fixing a special rate for money due for delinquent taxes, while the other provides for a special rate in judgments against incorporated banks.

To construe the Act of 1891 as operating to fix the rate of interest at 5 per cent. upon all obligations requiring the payment of money, would alter, repeal or amend every one of the special acts above referred to, though it is plain that there is no necessary repugnance between those acts and the Act of 1891.

Aside from the caption of this Act of 1891, it could not be well supposed that the Legislature intended to deal with interest upon judgments and decrees. That subject had always been regulated by special legislation without which neither judgments nor decrees would necessarily bear interest. The caption does refer to interest upon "judgments, " verdicts, etc.," but the body of the act makes no more reference to such obligations than did the 3d Section of the Act of 1838, which was in substantially the same words. If the

whole subject of interest on judgments and decrees was dependent upon this Act of 1891, it is quite plain that neither would bear interest by virtue of its terms.

Neither does the caption refer to the subject of interest upon decrees as distinguished from judgments. The Act of 1842, Section 966, Revised Statutes of the United States, regulates the subject of interest upon *judgments*. This has been held not to apply to decrees. *Perkins* v. *Fourniquet*, 14 How., 328, 331; *Hagerman* v. *Moran*, 75 F. R., 99.

Much stress has, however, been laid upon the title of this act as indicating a purpose to include the subject of interest upon "judgments, verdicts, etc.," meaning thereby "decrees" as of like character with judgments.

While the title of an act should not be altogether ignored and may afford a key to unlock the meaning of a very doubtful statute, yet the title of an act can not be used to extend the provisions of an act so as to include with its scope that which without such aid would plainly not be included. *Hayden* v. *Barney*, 5 Wall., 107; *Goodlett* v. *L. & N. R. Co.*, 122 U. S., 391, 408; *United States* v. *Palmer*, 3 Wheat., 610.

That the special provisions of the Michigan Statutes in respect to interest upon judgments and decrees are not necessarily inconsistent with the provision for the reduction of the general rate of interest upon contracts implied or express and not reduced to judgments or decrees is to our minds very plain. The two subjects had always theretofore been regulated by distinct provisions of law.

The Act of 1891 was plainly intended to displace the existing general law as embodied in the 3d Section of the Act of 1838, but we find no such repugnancy to the 8th Section of the same statute as to justify us in holding that

it has been repealed or amended by the later act. *State* v. *Stoll,* 17 Wall., 431; *Henderson's Tobacco,* 11 Wall., 652.

Section 8 of the Act of 1838 was a special act dealing only with the subject of interest upon judgments and decrees, which, without such legislation, would not, as a legal incident, bear interest.

The Act of 1891 may well be regarded as dealing only with the subject of interest as regulated by the 3d Section of the same Act of 1838. Though both Section 8 of the Act of 1838 and the Act of 1891 deal with the subject of interest, yet they can both stand together without inconsistency.

In such circumstances neither a repeal nor amendment of the older act will occur by implication alone.

The purpose of the more general of the two acts relative to the same general subject is not necessarily repugnant to a different interest in regard to interest upon a particular class or kind of obligations. The purposes of the general rule in respect to legal interest in cases not particularly provided for may be effectuated without implying a change of intention in respect of particular matters specifically dealt with in prior legislation. Where two distinct acts relate to the same general subject, one will not repeal the other by implication unless the later act is plainly intended to cover the whole field or is manifestly repugnant to the older law. *Rogers* v. *N. C. & St. L. R. Co.,* 33 C. C. A., 517.

3. It is assigned as error that the District Court decreed that the appellants should pay one-half of all the costs of this cause "in the Circuit Court of Appeals."

This was error, as those costs were included in the costs taxed in the Supreme Court and provided for by another part of the decree below.

The decree will in this respect be modified and in all other respects affirmed.

No. 6[illegible] 324 97

Bx. of Kremer for Petitioner

Filed May 13, 1901.

Office Supreme Court U.S.
FILED
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Clerk

IN THE

Supreme Court of the United States

In the Matter of the Petition of The Union Steamboat Company, Claimant of the Steamer "New York," for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the Case of The Union Steamboat Company, Claimant and Appellant, against the Propeller "Conemaugh" et al., Claimants and Interveners.

BRIEF FOR PETITIONER.

C. E. KREMER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioner.

Geo. Hornstein Co., Printers, Chicago.

IN THE

Supreme Court of the United States

In the Matter of the Petition of The Union Steamboat Company, Claimant of the Steamer "New York," for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the Case of The Union Steamboat Company, Claimant and Appellant, against the Propeller "Conemaugh" et al., Claimants and Intervenors.

BRIEF FOR PETITIONER.

On the 11th of November, 1891, The Erie & Western Transportation Company as owner of the steamer "Conemaugh" and as bailee of her cargo filed a libel in the District Court of the United States for the Eastern District of Michigan against the propeller "New York," to recover $70,000 as the damages sustained by it in the cost of raising and repairing the steamer "Conemaugh," the loss of her use while being raised and repaired and the damages sustained by her cargo.

The Union Steamboat Company as claimant and owner of the propeller "New York" filed its answer to this libel, denying all liability.

Subsequently it filed its cross libel against the propeller "Conemaugh" to recover the sum of $3,000, damages sustained by the "New York" in the same collision.

No answer was filed to this cross libel. At the trial the District Court held both vessels at fault for the collision.

See,

The "New York," 53 Fed. Rep., 553.

On a motion for a rehearing, the District Court reversed its decision and held the "New York" solely at fault for the collision.

Subsequently certain insurance companies that had insured the cargo of the "Conemaugh" filed an intervening petition in the cause, claiming the following amounts as part of the damages to the cargo for which the libelant had brought suit as bailee or trustee:

British & F. M. Ins. Co. Limited	$2,421 84
Ins. Co. of North America	7,950 09
Union Marine Ins. Co.	8,553 06
Marine Ins. Co.	916 57

To all of these petitions, the Union Steamboat Company filed its answer denying all liability for the collision, alleging that the fault rested solely upon the "Conemaugh."

On the 25th day of January, 1895, a stipulation was entered into by the parties, finding that the damages sustained by the "New York" in the collision amounted to the sum of $3,391.19. (Rec., 14.)

The Circuit Court of Appeals reversed this decision of the District Court and found the "Conemaugh" solely at fault for the collision, and decreed that the Union Steamboat Company was entitled to recover from the libelant the amount of the damages sustained by the "New York."

The "New York," 82 Fed. Rep., 819.

The petition for a rehearing was filed and denied.
The "New York," 86 Fed. Rep., 814.

The case was then brought by writ of *certiorari* to this court, and this court held that both vessels were at fault.
The "New York," 175 U. S., 187.

On March 17, 1900, the parties entered into a stipulation (Rec., 28), which provided that the damages sustained by the parties in the case should be as follows:

Erie & Western Transportation Company, owners of propeller "Conemaugh"	$30,508.46
Erie & Western Transportation Company, trustees for underwriters on cargo other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Ltd.	2,421.84
The Insurance Company of North America	7,950.09
The Union Marine Insurance Company	8,553.66
The Marine Insurance Company, Limited	916.57
The Union Steamboat Company, owners propeller "New York"	4,341.80
	$74,319.49

On the 24th day of March, 1900, the District Court in pursuance to the mandate entered a decree (Rec., 29), by which the Union Steamboat Company, owner of the propeller "New York," should pay all of the damages sustained by the intervenors, and by the libelant as bailee of the cargo, making all of the cargo damage, and also pay one-half of the damages sustained by the "Conemaugh" herself, less the amount of the damages to the "New York" so that the Union Steamboat Company would pay 76 and 5-10 per cent. of all the damages in the case instead of 50 per cent. of the same.

Thereupon the Union Steamboat Company filed its petition in this court, praying for a writ of mandamus directed

to the judge of the District Court, to order him to set aside the decree, and to enter a decree which would hold the owners of the "New York" for but one-half of the amount of the damages, in the doing of which, after allowing the contribution, there would still be an affirmative decree in favor of the libelant, the owners of the "Conemaugh," for $12,976.38.

This court issued an order to show cause, and upon a hearing upon the petition and answer of the district judge, argument and briefs of counsel, the court decided on May 28, 1900, as follows:

See,

Ex parte Union Steamboat Company, 178 U. S., 317.

Thereupon an appeal was prayed by the Union Steamboat Co. to the Circuit Court of Appeals, and there the case was decided, affirming the decision of the District Court. See, opinion made a part of the petition.

A motion to dismiss the appeal was denied.

The "New York," 104 Fed. Rep., 561.

BRIEF AND ARGUMENT.

We contend for the following:

First. We contend on behalf of petitioner that under the law, practice and procedure in Courts of Admiralty it is well settled that in all cases of collision, when two vessels are concerned, and both are found at fault, that the damages arising out of the collision be equally divided between the owners of the respective vessels, each paying one-half of the sum.

Second. We contend that whenever one of the vessels in fault is compelled to pay the whole of the damages of a third or innocent party, that any amount above a moiety of such damages which shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value) pay one-half of all damages arising out of the collision.

Third. We contend that under the law and practice in the Admiralty Courts of the United States, it is not necessary to bring a libelant in as a co-defendant under Admiralty Rule 59 in case an intervening petition is filed by a cargo owner who was originally a party libelant and first came into court under the original libel by the vessel owner suing for himself and as bailee of the cargo.

Fourth. We contend that whenever all the parties are before the court either as libellants or claimants and the court finds libelant's and claimant's vessels both at fault, further pleadings on behalf of the claimant like cross petitions or libels are not necessary to enable the court to grant recoupment and divide all the damages equally, even where

part of the damages are awarded to an intervening cargo owner.

Fifth. We contend that it is not necessary upon an appeal from the District to the Circuit Court of Appeals, that the record should show that recoupment had been demanded by pleadings or otherwise, as the trial in the Circuit Court in such a case is a trial *de novo.*

Sixth. We contend that if, on appeal from the District to the Circuit Court of Appeals, the respondent or claimant prays for recoupment which will divide the damages equally between the libelants and claimants, both vessels being held at fault, the court shall grant such recoupment notwithstanding the fact that the record does not show that recoupment had been prayed or demanded in the District Court.

At the time of the hearing in the District Court, upon the mandate of this court issued to it, we asked the court to enter the following decree, which appears as a part of the answer of the District Judge to the order to show cause in the case of *Ex Parte Union Steamboat Company, supra.* It is as follows:

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

The Erie & Western Transportation Company, owner of the Propeller "Conemaugh," *Libelant*, The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; the Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors*, vs. The Propeller "New York," The Union Steamboat Company, *Claimant*.	In Admiralty.

On reading and filing the mandate of the Supreme Court in this cause, bearing date January 22, 1900, and in obedience to said mandate, and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said propeller "Conemaugh" and the said propeller "New York" were both at fault for the collision set forth in the pleadings in this cause, and that the damages resulting therefrom to the said libelant, the owners of the cargo of the "Conemaugh" and underwriters thereon, the intervening petitioners, and the claimant of the propeller "New York" be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the damages resulting from the said collision, together with interest

thereon to July 3, 1896, amount to the sum of $74,319.49 and are payable to the following named and in the following proportion, viz:

Union Steamboat Company, damage to "New York"	$4,341.80
Erie & Western Trans. Co., damage to "Conemaugh"	30,508.56
Erie & Western Trans. Co., trustee for owners of cargo and underwriters other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Lim., Intervenors	2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited.	916.57
Insurance Company of North America,	7,950.09

And it appearing that the above named intervenors were insurers of portions of the cargo of the "Conemaugh" and that they have suffered damages on account of said collision, as follows, viz.:

British & Foreign Insurance Co.	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited.	916.57
Insurance Company of North America.	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and the American Surety Company, its surety, their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of 5 per cent. per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have execution therefor.

And it further appearing that the Erie & Western Transportation Company, as trustee for the underwriters and owners of the cargo of the "Conemaugh," has suffered damage by the said collision in the sum of $19,627.67, and that the Erie & Western Transportation Company as owner of said propellor "Conemaugh," has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company for itself, and as trustee, recover from the said Union Steamboat Company and its surety one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56 hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer "Conemaugh," amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer "New York," amounting to the sum of $12,976.38, with interest thereon at the rate of 5 per cent. per annum, from July 3, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court or to the proctors for said Erie & Western Transportation Company the said sum of $12,976.38, with interest as aforesaid, and that in default thereof that it have execution therefor.

It is further ordered, adjudged and decreed that the said Erie & Western Transportation Company recover from the Union Steamboat Company and its surety the sum of $84.12, being one-half of the costs of the Supreme Court; $276.75, less one-half of the costs of the Circuit Court of Appeals, $192.63, and further that said Erie & Western Transportation Company do recover from the Union Steamboat Company and its surety one-half of the costs in this

court to be taxed, and that in default in the payment of any of said sums that the said Erie and Western Transportation Company have executions therefor against the said Union Steamboat Company and the American Surety Company.

I.

WE CONTEND ON BEHALF OF PETITIONER THAT UNDER THE LAW, PRACTICE AND PROCEEDURE IN COURTS OF ADMIRALTY IT IS WELL SETTLED THAT IN ALL CASES OF COLLISION, WHEN TWO VESSELS ARE CONCERNED, AND BOTH ARE FOUND AT FAULT, THE DAMAGES ARISING OUT OF THE COLLISION BE EQUALLY DIVIDED BETWEEN THE OWNERS OF THE RESPECTIVE VESSELS, EACH PAYING ONE-HALF OF THE SUM.

It is unnecessary to cite authorities in support of this proposition, because ever since the decision of the case of *The Schooner "Catharine"* v. *Dickinson,* 17 How., 170, it has been the settled law of the United States that when the court finds both vessels concerned in the collision at fault, all of the damages are equally divided between them.

See,

The "North Star," 106 U. S., 17.
The "Chattahoochee," 173 U. S.
The "Manitoba," 122 U. S., 97.
The "Albert Dumois," 177 U. S., 240.

II.

WE CONTEND THAT WHENEVER ONE OF TWO VESSELS IN FAULT IS COMPELLED TO PAY THE WHOLE OF THE DAMAGES OF A THIRD OR INNOCENT PARTY, THAT ANY AMOUNT ABOVE A MOIETY OF SUCH DAMAGES WHICH SHALL BE PAID BY SUCH VESSEL CAN BE RECOUPED OR SET OFF AGAINST ANY CLAIM FOR DAMAGES THAT THE OTHER VESSEL MAY HAVE SUSTAINED BY REASON OF THE COLLISION, SO THAT EACH VESSEL (IF SHE BE OF SUFFICIENT VALUE) PAY ONE-HALF OF ALL DAMAGES ARISING OUT OF THE COLLISION.

The right to recoup or set off, as we contend for in this case, has long been the settled law in courts of admiralty in this country. One of the earliest cases found in the books is that of *The "Eleanora,"* 17 Blatch., 88.

In that case, the owners of the schooner "Transit" and the owners of her cargo, each filed a libel against the steamship "Eleanora" on account of a collision which resulted in the loss of the schooner and cargo.

The court held that both the schooner and the steamer were at fault for the collision, and on page 104, the court, Chief Justice WAITE, says:

> "Both vessels being in fault, as between themselves, the damages must be apportioned. Castner and others, who sue the 'Eleanora' alone, for the cargo, are entitled, under the rule in the case of *The Atlas* (93 U. S., 302), to a decree for the full amount of their loss; and, as the 'Transit,' if she had been joined, would have been liable for one-half of this loss, *a credit may be allowed the 'Eleanora,' on the decree in favor of the owners of the 'Transit,' for a sum equal to one-half of the damages of the cargo.* Although separate libels were filed by the owners of the vessel and the owners of the cargo, they constitute, in effect, but a single suit. They have been

heard together and submitted on the same evidence. Having all parties before it, the court may do what it would have done if there had been but one libel, that is to say, divide the damages of the collision throughout between the two colliding vessels. *A formal claim, to the effect, on the part of the 'Eleanora,' is not necessary.* It is rare that, in any case, a defending vessel makes a demand for a division of damages. A complete defense is generally insisted upon in the pleadings, and the apportionment is made by the court, on the facts as they are finally developed at the hearing. It is unnecessary to decide what the rule in this particular would be if the 'Eleanora' had not been subjected in the suit for the cargo, because here she has been, and that, too, upon the very testimony submitted in the suit between the two vessels. The fund belonging to the 'Transit,' growing out of the collision, is in court, and no injustice is done by using it to reimburse the 'Eleanora' for what she has paid for the 'Transit,' on account of the mutual fault of the two vessels."

Leonard v. *Whitwell,* 10 Ben., 638.

This was a libel *in personam* by the owners of the schooner "J. M. Leonard" against the owners of the steamship "Arragon" to recover the value of the schooner, her cargo and freight.

The court held both the schooner and the steamer at fault for the collision, and on page 658 Judge CHOATE says:

"The owners of the schooner have an undoubted right to sue on behalf of the owners of the cargo for its value. It would seem that, so suing, their rights as bailees must be as great as if the owners of cargo joined as libelants. No final decree should, therefore, it seems, be made which will give the libelants a smaller amount as bailees than the owners of the cargo would be entitled to receive. * * * It seems to be unnecessary to make the owners of the cargo parties, if that

could be now done. They are virtually before the court through the libelants."

The "C. H. Foster," 1 Fed. Rep., 733.

In this case the owners of the schooner "Helen Marr" filed their libel against the "C. H. Foster" for the loss of the vessel and her cargo, both of which were totally lost.

The court held both vessels at fault, and although the owners of the "Helen Marr" had limited their liablity under Section 4283, the court found that the owners of the "Foster" could recoup one-half the damages paid to the cargo against the sum which was due from the "Foster" to the "Marr," and this without additional pleading.

In *re Leonard,* following the ruling of Judge Choate in this case in 10 Ben., 638, the court holds that even though the limited liability proceedings had been taken on behalf of the schooner, the amount to be recovered from the offending steamer could be used as a fund to indemnify the steamer for what it had paid on account of the damage to the cargo exceeding one half.

In the case of *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279, citing with approval the language of Judge Choate in 10 Ben., 638, the court, on page 282, says:

> "Upon the ascertainment of the damages to the respective parties it will be competent for the court, following in principle the case of *The 'Eleanora,'* 17 Blatch., 105, to direct that the amount recoverable by the libelants in the suit *in rem* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or their representatives, the insurers, who are the libelants in the present suit, and be credited upon the claim in this suit. The claims of the respective parties would indicate a possibility that one-half of the loss of the cargo, for which the owners of the bark are answerable,

may exceed the amount recoverable for the loss of the bark from the steamer. Should that prove to be the case, the libelants would be entitled to a judgment in this suit against the respondents, *in personam,* for the difference; and the latter, for their own indemnity, would be entitled to a decree against the libelants in the suit *in rem* for such excess."

The "C. H. Foster," 1 Fed. Rep., 733.

The "Canima," 17 Fed. Rep., 271.

This was a libel filed by the owner of the canal boat "Redfield," and also a separate libel by the owner of her cargo of coal against the steamboat "Canima." The court found both vessels at fault, and on page 272 says:

"Duncan, the owner of the cargo, is entitled to recover his whole damages, with costs, as in the case of *The 'Atlas,'* 93 U. S., 302. But as the steamship, in paying the owner of the cargo, sustains damages to that amount, she is entitled on payment to offset this against the loss recoverable by the owner of the canal boat, so far as that will go; or, what comes to the same thing, the steamboat may charge against the sum payable to the owner of the canal boat the one-half of the damages to the cargo, which the latter ought by reason of his negligence to pay for the cargo, as in the case of *The 'Eleanora,'* 17 Blatch., 88, 105; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *Leonard* v. *Whitwell,* 10 Ben., 638, 658; *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279."

The "Hercules," 20 Fed. Rep., 305.

In this case two libels were filed against the steamer "Hercules," one for the total loss of a schooner and one for the loss of her cargo. The court held both vessels at fault, and on page 206 of the opinion, Judge LOWELL says:

"The claimants now ask that, from the damages which would otherwise be due the owners of the schooner, they

should be permitted to deduct or recoup one-half of the value of the cargo, because each party is liable for that loss, according to *The 'Atlas'* 93 U. S., 302. A recoupment of this sort has been allowed in several cases. See *The 'Eleanora,' supra; Leonard* v. *Whitwell,* 10 Ben., 638; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *In re 'Leonard,'* 14 Fed. Rep., 53; *Atlantic Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279; *The 'Canima,'* 17 Fed. Rep., 271. That one vessel was wholly lost does not prevent a contribution in case of mutual fault. *The 'North Star,'* 106 U. S., 17; S. C., 1, Sup. Ct. Rep., 41."

The "Job T. Wilson," 84 Fed. Rep., 149.

This was a libel by the owner of the tug "Wilson" against the steamship "Howard," and also an intervening petition by the owners of a scow in tow of the tug "Wilson" at the time of the collision.

The court held that the owners of the scow, as innocent parties, were entitled to recover from either the tug or the steamer, both having been held to be at fault for the collision, and on page 207 Judge MORRIS says:

"It seems to me a similar injustice would be worked by permitting the owners of a vessel which is primarily liable for only one-half of the damage of an innocent sufferer to be compelled to pay the other half charged against the other vessel, and yet refusing to allow the owners of the vessel which has paid the whole to obtain the excess out of the money in their hands payable to the owners of the other vessel, for damages arising from the same collision. The whole object, as it seems to me, of the practice in admirality, which enables the court to deal with all the questions arising from a collision as one transaction, is to prevent such inequitable results. *The 'City of New York,'* 25 Fed. Rep., 146; *The 'Canima,'* 17 Fed., 271; *The 'Hercules,'* 20 Fed., 205."

Jacobsen v. *Springer,* 87 Fed. Rep., 948.

This was a collision between the steamer "Argo" and the Norwegian steamship "Dumois." Petitions were also filed on behalf of people who were injured and the Circuit Court of Appeals for the Fifth Circuit divided the damages, and on page 953 Judge PARDEE says:

> "Finding, as we do, both the 'Dumois' and 'Argo' in fault, the decree of the District Court must be reversed, and a new decree, adjusting the damages, entered. The crew of the 'Argo' who lost their effects by the collision are entitled to recover only half their damages from the 'Dumois,' and, as the 'Argo' was in fault, nothing from their own ship. *The 'Queen,'* 40 Fed. Rep., 694; *The 'City of Norwalk,'* 55 Fed., 102. Hester and Blesine being passengers on board the 'Argo,' and not in fault, their representatives are entitled to recover the full damages from the 'Dumois;' but the 'Dumois' is entitled to recoup half the damages so paid, and deduct the same from the amount awarded to the owners of the 'Argo.' *The 'Hercules,'* 20 Fed., 205; *The 'North Star,'* 106 U. S., 17, 1 Sup. Ct., 41. The 'Argo,' being a total loss, can recover one-half her value from the 'Dumois,' less one-half the damages suffered by the 'Dumois,' shown by the record to be $185. Decreed accordingly."

This last case was affirmed by this court in the *"Albert Dumois,"* 177 U. S., 240.

"The Livingstone," 104 Fed. Rep., 918.

We are satisfied that the District Court was misled in the construction of the opinion of the Supreme Court by the quotation made by the latter from the case of the *"Juniata,"* 93 U. S., 337, in this language:

> "Whatever their rights may be as against Pursglove by reason of such payment of more than half must be settled in another proceeding. It cannot be done in this litigation."

In this case an original and separate libel was filed by the United States as owner of a certain scow against the steamer "Juniata" alone. The collision in the case was between the "Juniata" and the "Neafie," and a separate suit had been brought by Pursglove, owner of the "Neafie," against the "Juniata." Neither the "Neafie," nor Pursglove, her owner, had been made a party *to this suit,* therefore, when the court found the "Neafie" and the "Juniata" both at fault for the collision, it held that the United States, as the owner of the innocent scow in its suit against *the "Juniata" alone* must recover its full damage against the latter, and could not have a joint decree against *the "Juniata" and the "Neafie"* or Pursglove, as the owner of the latter, *because neither the "Neafie" nor Pursglove had been made a party to the libel filed by the United States against the "Juniata."*

The court, therefore, said that in this proceeding no one could be reached but the "Juniata," the only defendant in the case, and that, therefore, if Pursglove or the "Neafie" were to be reached, it must be in a separate proceeding.

The case of the "Juniata" would be in point if the owners of the cargo of the "Conemaugh" had filed an original and separate libel against *the "New York" alone;* then, unless the "Conemaugh" had been made a party to this libel, the decree must run for the whole amount against the "New York" and then there would be no opportunity to offset or recoup against the "Conemaugh" because the latter was not a party to the suit.

In this case, however, the intervenors came in under a proceeding in which the owners of the "Conemaugh" were libelants, and the owners of the "New York" claimants.

The other owners of the cargo of the "Conemaugh" have brought their suit in the name of the owners of the "Cone-

maugh." All parties in interest are, therefore, before the court either as parties libelant or respondent.

The owners of the "Conemaugh" as libelant, after the court has found that the libelant and claimants are jointly liable each for a moiety of the damages, would be estopped from saying that for the cargo damaged no recovery could be had against it, because it, the libelant, had not been made a party defendant by the owner of the cargo.

"The Livingstone," supra.

III.

WE CONTEND THAT UNDER THE LAW AND PRACTICE IN THE ADMIRALTY COURTS OF THE UNITED STATES, IT IS NOT NECESSARY TO BRING A LIBELANT IN AS A CO-DEFENDANT UNDER ADMIRALTY RULE 59 IN CASE AN INTERVENING PETITION IS FILED BY A CARGO OWNER, WHO WAS ORIGINALLY A PARTY LIBELANT AND FIRST CAME INTO COURT UNDER THE ORIGINAL LIBEL BY THE VESSEL OWNER SUEING FOR HIMSELF AND AS BAILEE OF THE CARGO.

The Circuit Court of Appeals held that when the intervening petition was filed by the underwriters of a part of the cargo of the "Conemaugh," that the "New York" might have availed itself of Admiralty Rule 59, and brought the "Conemaugh" in as a party respondent and as a vessel in fault, which also ought to be proceeded against for cargo loss, and cites in support of this proposition *"The Beaconsfield,"* 158 U. S., 303, 307.

When these petitions were filed, the "New York" took the only consistent position which it could take under the answer filed to the original libel, namely: that she was not at fault for the collision, and that the "Conemaugh" was the vessel that was guilty of all the fault.

It would have been an anomalous position to have said in one answer in the case that the "New York" was not at fault and the "Conemaugh" solely at fault; and in another answer to allege that both of the vessels were at fault, or that the "New York" might be at fault as well as the "Conemaugh" and that in such a case the damages should be divided.

Suppose such an answer had been filed. It would not have aided the court in the least in arriving at a division of the damages. It would have operated no more than a suggestion that in case both vessels were held at fault, that both should pay the damages sustained by the intervenors.

The case of *"The Beaconsfield"* is not in point, because in that case the only original libel was filed by the master and owner of the "Beaconsfield" for damages to the "Beaconsfield's" cargo *alone* against the "Brittania" *alone,* the latter claiming that the "Beaconsfield" was also at fault (she not being made a party libelant), brought her in under Admiralty Rule 59. This was necessary, because the "Beaconsfield" was not a party to the suit. Her owners and master were suing in the capacity of trustees and not as owners, and there could be no offset against them in that capacity, and it was absolutely necessary, if the "Beaconsfield" was to share a portion of the loss, or to bear all of it, that she should be brought in as a party defendant.

In this case, the owners of the "Conemaugh" were in court not alone as bailees or trustees, but as owners of the "Conemaugh," and therefore, were as much in court as a party libelant, as they could possibly be as a party defendant, and the court was perfectly competent to do in this case, what had been done in all of the cases cited in this brief, and in all cases that we have ever known of, viz.: to recoup

and offset the damages, so that the innocent parties would recover all of their damages, and the owners of the "Conemaugh" and "New York" would divide the loss equally between them.

The case of *"The Livingstone,"* 104 Fed. Rep., 918, is directly in point. In that case the libel was filed by the owners of the sunken "Grand Traverse" against the "Livingstone" to recover the cargo damages as well as the damage to the libelant's vessel.

The court held that it was not necessary to bring the owners of the "Traverse" in under Rule 59, nor were pleadings in the form of the cross libels or petitions necessary. The stipulation in that case, like in the case at bar, estops the libelants from setting up any defense to the claim of the intervening cargo underwriters.

Recoupment has always been allowed without further pleadings and there was no more necessity for pleadings in this case than in any other.

There is not a case in the books nor in any text or form books, that states that such a proceeding or any proceeding in a case like this is necessary to enable the court to grant recoupment and adjustment of the payment of the damages so that they will be paid in equal amounts by the libelant and respondent.

IV.

WE CONTEND THAT WHENEVER ALL THE PARTIES ARE BEFORE THE COURT, EITHER AS LIBELANTS OR CLAIMANTS, AND THE COURT FINDS LIBELANTS' AND CLAIMANTS' VESSELS BOTH AT FAULT, FURTHER PLEADINGS ON BEHALF OF THE CLAIMANT, LIKE CROSS PETITIONS, OR LIBELS, ARE NOT NECESSARY TO ENABLE THE COURT TO GRANT RECOUPMENT AND DIVIDE ALL THE DAMAGES EQUALLY, EVEN WHEN PART OF THE DAMAGES ARE AWARDED TO AN INTERVENING CARGO OWNER.

The District Court, in its return to the order to show cause (having written no opinion in the case), held that the pleadings were of such a character that decrees could not be entered which would permit the recoupment, and that under the form of the decree offered and urged by the Union Steamboat Company, the petitioner herein would obtain direct affirmative relief against the libelant for the sum of $6,621.88, and that such affirmative relief could not be had or obtained because of the absence of pleadings on behalf of the Union Steamboat Company praying such relief.

We contend that no further pleadings were necessary. In all of the cases of recoupment that we have been able to find in the books, there is not one of them that speaks of any additional pleadings.

The facts in the case of "*The Eleanora,*" 17 Blatch., 88, are similar to the facts in this case, and in that case the owners of the "Eleanora" did not file any answer to the libel of the owners of the cargo of the "Transit," setting up the joint fault of the "Transit," or that she should contribute to any loss that the "Eleanora" might have to pay to the cargo owners. The court, however, had no difficulty in settling the damages, so that each party paid one-half.

The case of *The Atlantic Mutual Insurance Company* v. *Alexandre,* 16 Fed. Rep., 279, was a case where the court say that if the amount paid to the cargo should exceed the amount to be recovered for one-half of the vessel, then the court say:

> "Should that prove to be the case, the libelant would be entitled to a judgment in this suit against the respondents *in personam,* for the difference, and the latter for their own indemnity be entitled to a decree against the libelants in the suit *in rem* for such excess."

In none of these cases does it appear that any additional pleadings, except libels and answers, were filed.

The court, however, having all the parties before it and the fund, could so distribute it, and under such decrees as would result in the payment of all the damages, and a proper division of them among the parties liable.

When the decision of this court was reversed by the Supreme Court and both vessels were held at fault, then we contend no further pleadings were necessary, because the court decided both vessels at fault, which made an equal division of the damages. All the parties that were to bear these damages were before the court, either as libelant or claimant.

Suppose further pleadings had been desired; they would have consisted of a sort of cross libel, or cross petition in which the "New York" would set up the payment of the cargo damages, and a prayer that these damages might be recouped against the claim of the "Conemaugh," either as libelant and owner, or as libelant, trustee or bailee. Such a petition could not be filed until after payment had been made. It would then be too late.

We could therefore see no useful purpose that such a petition or cross libel could serve, and felt and still feel sure that the relief could be granted without this.

If any injury could occur, or if a stranger to the controversy here was affected by such a decree as we contend for, the case would be different. But no third party is in any way interested.

We therefore contend that no further pleadings are necessary in order to secure an equal division of the damages in this case.

The libelant by its contention is practically placed in the position of saying, that so much of the cargo as is represented by it as bailee or trustee can not recover against it, because it, the libelant, has not been made a party defendant by it, the libelant trustee.

The libelant can not claim any benefit or advantage by reason of its dual position. It can not as libelant owner of the "Conemaugh" say to itself as libelant bailee that it will not pay one-half of the damages sustained by it as bailee of the cargo. It is as much liable as a party libelant in this suit as it would be as a party defendant. It is as much before the court in the one case as in the other, as much subject to the process and orders of the court, and we can see no advantage that could be gained by having the libelant also made a defendant in the same suit in which it is already a party libelant.

The objection made here is purely technical. All the questions in the case could have been settled in the District Court, as all the parties in interest were before the court.

Upon this question of further pleadings the case of *"The Eleanora,"* 17 Blatch., 83, cited at length herein, is directly in point.

See, also,

"The Livingstone," 104 Fed. Rep., 918.

Leonard v. *Whitwell,* 10 Ben., 638.

"The C. H. Foster," 1 Fed. Rep., 733, and the other cases cited in our brief.

The case of *"The Manitoba,"* 122 U. S., 97, in many particulars resembles the case at bar.

In that case the owners of the propeller "Comet" libeled the "Manitoba" for the following damages:

The value of the "Comet"	$30,000
The value of her cargo	35,000
The value of her freight	5,125

The court held both vessels at fault, divided the damages, and in doing so added together the total damages claimed by the libelant, and to these the damages sustained by the "Manitoba" and then entered a decree in favor of the libelant for one-half of these against the "Manitoba." The amount recovered, however, was less than the amount awarded, because of the limited liability proceedings which had been taken in the interests of the "Manitoba."

It does not appear in that case that any pleadings were filed by the owners of the "Manitoba" against the owners of the "Comet" to recover the damages sustained by the owners of the "Comet's" cargo. We doubt this ever having been done in any case. We certainly have had no such experience, nor have we been able to find any case of the kind in the books.

Libelant furnishes no precedent or authority in point to sustain the position that the court can not now, under the present state of the pleadings, grant the relief asked and do full and perfect justice to all the parties in interest.

In the case at bar, the decree we asked to have entered for the payment of all the damages of the intervenors, namely $19,841.56, by the Union Steamboat Company, and for a further recovery by the libelant from the Union Steamboat

Company of the sum of $12,976.38, which, together, amounts to the sum of $32,817.94, one-half of the total damages sustained in this case. This leaves the libelant to account to the owners of the cargo represented by it as trustee either for the whole or a part of the damages, if by any private arrangement or contract its liability was lessened.

Why should Courts of Admiralty, which up to this time have been Courts of Justice unhampered by the artificial pleadings, petitions, issues and other means often resorted to by courts of common law to thwart and defeat the ends of justice, be hampered by such things as the formal pleadings which are now advocated? For what purpose are they advocated? Not to promote justice and speedy relief, but to retard and obstruct it, and if possible defeat in this case the well settled rule of law that each party must bear one-half of the damages.

Here the owners of the cargo are not in court as independent and original libelants, but are represented by the owner of the "Conemaugh." The owner of the "Conemaugh," as libelant, after the court finds that the libelant and claimant are jointly liable each for a moiety of the damages, will be estopped from saying that this amount can not be recovered of it, because it, the libelant, was not made a party defendant by the owners of the cargo.

In other words, the libelant can not defeat the claim of *libelant as trustee* because as such trustee it did not make the libelant a party defendant. Neither can the libelant defeat the claim of the claimants for contribution because the latter did not make the libelant a party defendant.

The object of a pleading is to form an issue. In a case of this kind after the court had found both vessels at fault,

all issues were determined and no new issues could be raised by any further pleadings that could be filed. The right of contribution existed of course, and could be enforced under the pleadings then on file in the case. More pleadings could serve no useful purpose, as everything appears of record, and they would therefore be only an unnecessary incumbrance of the record.

Courts of admiralty have always favored the directest course, and simplest methods in arriving at the distribution and contribution of damages in collision cases.

A very able review of the authorities touching the point of additional pleadings is found in case of *Ebert* v. *The Schooner "Reuben Doud,"* 3 Fed. Rep., 520, and it seems to us that *"The Sapphire,"* 18 Wal., 51, as well as the case of *"The Pennsylvania,"* 12 Blatch., 67, Sc. 19 Wal., 125, is also in point.

In these cases, it has practically been held that a cross libel is not necessary if it appear from the answer that the respondent has suffered damages. Such damages can be recouped without a cross libel.

This is not necessarily in conflict with the authorities that hold that to obtain affirmative relief a cross libel is necessary.

In this case affirmative relief is not demanded, but the libelant is to recover a decree for a considerable amount in settling the damages arising out of the collision.

Courts of Admiralty in England have been equally liberal in this respect. *"The Seringapatim,* 3 Wm. Rob., 38.

In this case the cross action had been abandoned and after the court had held both vessels at fault Dr. LUSHINGTON, in his opinion, says:

"Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to the amount of the compensation to which the owners of the 'Hariet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages, sustained by the owners of the 'Seringapatim.'"

With all the parties before the court, we claim that no further or other pleadings are necessary.

In the case of *"The Livingstone,"* 104 Fed. Rep., 918, the proctors for the appellee made the same point that he is making here, but the District Court for the Western District of New York held that the libelant must account to the owner or underwriter of his cargo in the same manner as if made a party defendant, although not such by cross libel, petition or answer.

V.

WE CONTEND THAT IT IS NOT NECESSARY, UPON AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THAT THE RECORD SHOULD SHOW THAT RECOUPMENT HAD BEEN DEMANDED BY PLEADINGS OR OTHERWISE, AS THE TRIAL IN THE CIRCUIT COURT, IN SUCH A CASE, IS A TRIAL *de novo*.

We claim that a trial *de novo* gives the appellants the right to be heard upon any point that can be raised upon the record, and it is entirely immaterial whether this record shows that the same point had been raised in the District Court or not, and that even if it had not been raised in the District Court, the Court of Appeals should consider it though raised for the first time on appeal. This court has

never passed upon this question since the passage of the Act of 1891.

As to Trial *de Novo*.

The Act of Congress of March 3, 1891, establishing the Circuit Court of Appeals, provides in Section 11 as follows:

> "And all provisions of law now in force regulating the methods and systems of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals."

This section left the mode of procedure in appeals in admiralty from the District Court in substantially the same condition and under the same practice as it existed at the time of the passage of the act.

The Act of Congress passed February 16, 1875, and entitled: "An Act to facilitate the disposition of cases in the "Supreme Court and for other purposes," is expressly repealed by the 14th Section of the Act of 1891, as are also all acts or parts of acts inconsistent with the provisions for review by appeals in Section 5 and 6 of the act.

While,under the Act of 1875,it was the duty of the Circuit Court in case of appeals in admiralty to the Supreme Court, to make findings of fact, these provisions did not affect the procedure in appeals from the District Court to the Circuit Court, and it was held in the case of *"The Havillah,"* 48 Fed. Rep., 684, that in appeals from the Circuit Court to the Circuit Court of Appeals, even after the passage of the Act of 1891, findings of fact as provided by Act of 1875 were not necessary.

Section 30 of the Act of Congress, September 24, 1789, provides that on appeals in admiralty from the District

to the Circuit Court, the same witnesses who were examined in the former might be re-examined in the latter. This provision of the laws was omitted in revision of 1874, and we find in the Revised Statutes, Section 631, as follows:

> "From all final decrees of the District Court in causes of equity, of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of $50, exclusive of costs, an appeal shall be allowed to the Circuit Court, next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632: "In case of an appeal as provided by the "preceding section, copies of the proof and such entries "and papers on file as may be necessary on hearing of the "appeal may be certified up to the Appellate Court."

Section 862, passed August 23, 1842, provides: "The "mode of proof in causes of equity and admiralty and mari- "time jurisdiction shall be according to rules now or here- "after prescribed by the Supreme Court, except as herein "specially provided."

Under this act the Supreme Court formulated Admiralty Rules 49 and 50. The first of these rules provided for the taking of depositions in the Circuit Court, and Rule 50 requires that the oral evidence shall be taken down by the Clerk of the District Court, pursuant to the Act of Congress, 1789, and this shall be transmitted to the Circuit Court and used in evidence on appeal, and it then proceeds as follows: "Saving to each party the right to take the depositi- "tion of the same witnesses, or either of them, if he should "elect." Rule 52 specifies how the records in appeals in admiralty to the Circuit Court shall be made up, and this rule is expressly recognized by Rule 6 of the Courts of Appeals.

It will be noticed that the last, the 11th section, of this rule, is as follows: "The prayer for an appeal and the action of the District Court thereon, *and no reasons of appeal shall be filed or inserted in the transcript," and then follows what shall be omitted.*

This is substantially all the statutory law and the rules made in pursuance of the statutes that bear upon this subject. We will now proceed to take up the decisions of the various Circuit Courts and the Supreme Court, upon the question of whether on an appeal from the District to the Circuit Court there was a trial *de novo,* and whether under the Act of 1875, and the Act of 1891, the trial in a case on appeal from the District to the Circuit Court of Appeals shall be a trial *de novo.*

In the case of *Yeaton* v. *U. S.,* 5 Cranch, 283, Chief Justice MARSHALL says:

> "The majority of the court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the Appellate Court be pronounced. The cause in the Appellate Court is to be heard *de novo,* as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the District to the Circuit Courts of the United States, but in this court also."

The Steamer "Saratoga" v. 438 *Bales of Cotton,* 1 Woods, 75. This was a case in which the libelant recovered the sum of $900, and then took an appeal from the District to the Circuit Court. The Circuit Court dismissed the libel, whereupon the libelant contended that inasmuch as the claimant had not appealed from the decree of the District Court, the decree for $900 in favor of the libelant must stand.

13420

Judge Woods says the following:

> "When libelants appealed, the appeal opened the whole case. They can not be allowed to claim the benefit of the decree below, and, standing secure on that, try their fortunes in this court. In admiralty cases an appeal suspends the decree altogether. It is not *res adjudicata* until the final sentence of the Appellate Court is pronounced. *"The Roarer,"* 1 Bl., C. C. I., *Yeaton* v. *The United States,* 5 Cranch., 281. The cause in the Appellate Court is to be heard *de novo,* as if no decree had been passed. We do not find these views opposed to the authorities cited by libelants. In fact, those authorities do not seem to touch the question at all."

In the same court by Pardee, J., *"Lillie,* 42 Fed. Rep., 179; *"The Cassius,"* 41 Fed. Rep., 367.

The case of *The "Lucille,"* 19th Wall., 73.

In this case Mr. Justice Miller on p. 74 says:

> "An appeal in the admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated, a new trial, in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be enforced by the order of that court and the record remains there."

In the case of *The "Charles Morgan,"* 115 U. S., 69, Mr. Chief Justice Waite, after approving the language used by the Supreme Court in the case of *The "Lucille,"* states that the parties had a right in the Circuit Court to amend their pleadings and cites a number of cases upon this point.

The case, however, which is directly in point, is that of *Irvine* v. *The "Hesper,"* 122 U. S., 256. In that case the District Court awarded the libelant a certain sum for salvage, and an appeal was taken by the libelants, but the claimants failed to perfect their appeal. The Circuit Court award-

ed a sum less than that awarded by the District Court. Thereupon the libelants appealed to the Supreme Court, which affirmed the decree of the Circuit Court. On p. 266, Justice Blatchford says:

> "The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court and that the Circuit Court could not reduce that amount, but had jurisprudence, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court."
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> *Yeaton* v. *U. S.,* 5 Cranch, 281.
>
> Anonymous, 1 Callison, 22.
>
> *The "Roarer,"* 1 Blatchford, 1.
>
> *The "Saratoga* v. 438 *Bales of Cotton,* 1 Woods, 75.
>
> *The "Lucille,"* 19 Wall., 73; *The "Chas. Morgan,"* 115 U. S., 69, 75.

> "We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo.* The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."
>
> *The "Hesper,"* 18 Fed. Rep., 696.

The "Philadelphian," in the Circuit Court of Appeals for the first circuit, 60 Fed. Rep., 423:

In this case the court held that the provisions of the Judiciary Act of 1875 did not apply to the Circuit Court of Appeals in cases of appeals from the District Court, approving the decisions of the court in *The "Havillah,"* 48th Fed.

Rep., and the court repeats the language used by the Supreme Court in the case of *"Lucille,"* viz. "That there is a "new trial, completely and entirely new, with other testimony "and other pleadings, if necessary, or if asked for."

The "Louisville," 154 U. S., 657. In this case Mr. Chief Justice WAITE delivered the following:

> "An appeal in admiralty from the District Court to the Circuit Court vacates the decree appealed from. The case is heard *de novo* in the Circuit Court, without any regard to what was done below. An entire new decree is entered, which the Circuit Court carries into execution. The cause is not remanded to the District Court. After the suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally begun in that court."
>
> *The "Lucille,"* 19 Wall., 74.
>
> *Montgomery* v *.Anderson,* 21 How., 388.
>
> *Yeaton* v. *United States,* 5 Cranch, 283.
>
> *Nelson* v. *White,* 83 Fed. Rep., 215, decided by the Circuit Court of Appeals for the 9th Circuit.

In this case it is held by the court and stated as follows:

"It is a well settled rule that an appeal in admiralty is to all intents and purposes a trial *de novo."* The court further holds that the judiciary act of 1875 does not apply to the admiralty appeals from the District Court to the Circuit Court of Appeals.

> *Singlehurst* v. *La Campagnie Gen. Trans.,* 50 Fed. Rep., 104.
>
> *Pettie* v. *Boston Tow Boat Co.,* 49 Fed. Rep., 464.
>
> State of California, Ibid., 172.

In the late case of *Gilchrist* v. *The Chicago Insurance Company,* 104 Fed. Rep., 566, Mr. Justice HARLAN holds that

in appeals in admiralty from the District to the Circuit Court of Appeals, there is a trial *de novo*.

In this case, the libelant appealed from the decree in his favor in the District Court. The respondent did not appeal.

It was contended on behalf of the libelants that the respondents could not be heard except in defense of the decree, whereas respondents contended that the appeal gave them a trial *de novo* in the Circuit Court of Appeals and that they could be heard upon all the defenses which were interposed in the District Court.

On page 571, the court say:

> "We do not think that the rule has been changed by the above act of March 3, 1891, under which an appeal from the District Court goes to the Circuit Court of Appeals, and not to the Circuit Court. The clause in that act (section 11) that 'all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals, does not prevent a Circuit Court of Appeals, when hearing an appeal in admiralty, from exercising all the power that a Circuit Court could have exercised in a like case prior to the act of 1891. On the contrary, that clause implies that an admiralty appeal by the libelant in the Circuit Court of Appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the Circuit Courts prior to the passage of that act. It results that this court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libelants are not entitled to a decree in any amount,—and such is the contention of the underwriters,—we may

dismiss the libel, notwithstanding the underwriters did not themselves directly appeal from the decree."

In the recent case of the *Graham & Morton Transportation* v. *The Chicago Insurance Company,* decided on April 9, 1901, the United States Circuit Court of Appeals for the Sixth Circuit in part reiterated what was said in the last case.

VI.

WE CONTEND THAT IF, IN CASE OF AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THE RESPONDENT OR CLAIMANT PRAYS FOR RECOUPMENT WHICH WILL DIVIDE THE DAMAGES EQUALLY BETWEEN THE LIBELANTS' AND CLAIMANTS' VESSELS, BOTH BEING HELD AT FAULT, THE COURT SHALL GRANT SUCH RECOUPMENT, NOTWITHSTANDING THE FACT THAT THE RECORD DOES NOT SHOW, THAT RECOUPMENT HAD BEEN PRAYED OR DEMANDED IN THE DISTRICT COURT.

If there is a trial *de novo* as we have shown by the authorities cited, under the preceding point, then appellant had a right to ask the Appellate Court to grant recoupment and remand the case for the entry of such a decree as would properly divide the whole damage arising out of the collision equally between the libelant and claimant.

An assignment of error is filed in this case which brings up the question of recoupment.

It may be doubted, however, if an assignment of error even is necessary. We believe that no reason for an appeal is necessary under the present law and rules of the Courts of Appeal.

Prior to the Act of 1891, appeals in admiralty went from the District to the Circuit Court, under Section 631 of the Revised Statute, which provides as follows:

"From all final decrees in the District Court in cases of equity or *of admiralty and maritime jurisdiction,* except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, *an appeal* shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632 provides as to the record on appeal:

"In case of an appeal as provided by the preceding section, copies of the proofs, and of such entries and papers on file *as may be necessary* on hearing of the appeal, may be *certified* up to the Appellate Court."

In the case of the *United States* v. *Monson,* Case No. 16750 Fed. Cas., Mr. Justice STORY, in reviewing the right to appeal from a District to a Circuit Court, under the Acts of 1789 and 1803 said that no appeal lies from the District to the Circuit Court, except in cases of admiralty and maritime jurisdiction, and that a writ of error is the proper process to correct the errors of the District Court in common law actions.

In a very able and exhaustive opinion on the difference between an appeal and a writ of error, among other things the learned justice said:

"The remedy by appeal, as known and practiced in England, is in a great measure confined (for I speak not of summary proceedings before magistrates, or appeals of death or robbery) to causes of equity, ecclesiastical and admiralty jurisdiction; in all of which no jury intervenes. In the courts possessing these respective jurisdictions, the Judge is in general the sole arbiter of the fact and of law, and the mode of proceeding is borrowed, almost exclusively, from the civil law. It is undoubtedly true that in courts proceeding according to the course of the civil law, an appeal from an inferior to a superior tribunal removes the whole procedings, and

usually, though not invariably, opens the facts as well as the law to re-examination. (*Wiscart* v. *D'Auchy*, 3 Dall (3 U. S.), 321.)"

U. S. v. *Nourse*, 6 Pet., 470.

U. S. v. *Haynes*, 2 McLain, 155.

Section 6 of Rule 14 of the Court of Appeals for the Sixth Circuit provides:

"The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court."

Under the Act of 1842, the Supreme Court promulgated General Admiralty Rule 52. Section 11 of this rule provides:

"The prayer for an appeal and the action of the District Court thereon and no reasons for the appeal shall be filed or inserted in the transcript."

It also provides that the certificate of the Clerk is all that is needful to complete the record.

Assignments of error are only proper in cases of the suing out of writs of error at common law, and the service of citations also applies only to cases of writs of error.

Under the practice that prevailed prior to the promulgation of the rules governing the Circuit Court of Appeals, in appeals from the District to the Circuit Court, it was not the practice to issue a citation, or serve the same because the case was up by appeal and not by writ of error. So held in *"The Ellen,"* 4 Blatch., 107.

Let us trace the origin of the rules of the Appellate Courts on this subject.

Rule 14 of the Court of Appeals was copied from Rule 8 of the Supreme Court. Let us compare:

The first sections are identical, except that there is added

to the rule in the Court of Appeals that the Clerk may require a præcipe of the appellant or plaintiff in error.

Sections 2, 3 and 4 are identical. Section 5 as to citations is changed but slightly, and the change amounts to this, that they shall be in all cases made returnable in thirty days from the date thereof, instead of the first day of the term.

Section 6 is changed because under the Act of 1875 in appeals from the Circuit to the Supreme Court, the Supreme Court merely passed upon the findings of fact by the Circuit Court, and the questions of law arising upon these.

We quote at length Section 5 of Rule 8 of the Supreme Court to show that that rule provided merely for a citation in case of a writ of error, *and not in cases of appeal.*

> "In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, *the writ of error and citation,* if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day."

We also insert here Section 5 of Rule 14:

> "All *appeals,* writs of error and citations must be made returnable not exceeding thirty days from the date on which the *appeal* is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident, the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another resident be designated of record in the case upon whom service may be had."

It will be noticed that the section begins with the words "All appeals, writs of error, and citations must be made "returnable not exceeding thirty days."

It is apparent, when reading both the rule from which Section 5 was copied and Section 5 itself, that the citation was not intended to apply to appeals at all, and that whoever framed these rules lost sight of the difference between writs of error and appeals, and that the rule should be read with the word "appeals" in the first line stricken out.

There certainly is no sense in saying that an appeal must be made returnable from a certain date. The appeal goes as a matter of right, and no citation should be necessary. Ordinarily an appeal runs to the next term of the Appellate Court.

We have always contended that the citation was unnecessary, but have used it merely to be on the safe side of the practice.

In Benedict's Admiralty we find the following:

> "SECTION 628. In my opinion, the practice of making an assignment of errors is inappropriate to the admiralty. It is appropriate to the common law system, in which the theory is that questions of fact are to be determined by a jury, and are not to be reviewed by the Appellate Court, whose function is only to review the errors made by the Judge below, who has only matters of law to determine."
>
> "SECTION 629.—ALLOWANCE OF APPEAL: The words of the 11th General Rule that 'no appeal shall be allowed until such assignment of errors is filed,' would seem to require an allowance of an appeal. Such an allowance in terms has not thus far been held to be indispensable, and the right to an appeal would seem to be a statutory right and therefore not subject to an allowance or disallowance. The approval of the bond

> and the signing of the citation would probably be held to be an allowance of the appeal. But it is well to have the judge who approves the bond also in terms allow the appeal, in order to avoid question."

We can find no warrant, however, for the author's statement that a citation was required on an appeal in admiralty from the Circuit Court to the Supreme Court prior to the Act of 1891.

The rule of court certainly does not require it. Neither does the statute. We can find no reference to a citation, except in Section 5 of Rule 8, and this applies, as we have shown before, to final judgments and *not decrees,* and has reference only to writs of error, the words "writ of error " and citation" always being found together.

So that, notwithstanding the 8th rule of the Court of Appeals providing that the practice, so far as may be, shall be the same as in the Supreme Court of the United States, no practice not required by law or the rules of that court can be held to be such practice as was intended to be adopted by this rule.

Citations may have been used, and in this way a practice to use them may have grown up and the court may have known of this, but there is nothing in either the statute or the rules of the court requiring it, and therefore it is not a rule of the Court of Appeals.

Under the former practice in taking appeals in admiralty cases from the Circuit Court to the Supreme Court it was done under Section 692, and the record in such cases was made up under Section 698, and this record did not require assignments of error or citations.

There are numerous decisions by the Supreme Court in the books in which the question of the necessity for issuing

and serving a citation in an appeal from the Circuit to the Supreme Court has come up.

Barril v. *Prop. "Mohawk,"* 3 Wall., 424.
Dayton v. *Lash,* 4 Orto., 112.
Str. "Douro," 3 Wall., 564.
C. & P. R. R. Co. v. *Blair,* 100 U. S., 661.
Vansant v. *Gas L. Co.,* 99 U. S.
Farrar v. *Churchill,* 10 Sup. Crt. Rep., 772.

In some of these cases it is difficult to determine from the report of the case whether the case was one of common law or equity.

There seems to be running through these cases an indifference to the distinction between a writ of error and an appeal, and frequently the parties before the Supreme Court have been called appellants and appellees without reference to the fact that they were in that court as plaintiffs and defendants in error, and not as appellants and appellees.

In one case, that of *Farrar* v. *Churchill,* 10 Sup. Ct. Rep., 772, the court holds that in case of an appeal (which indicates that it might be an equity case) assignments of error were necessary under Section 997.

The court seems to have overlooked the fact that in removing a case from the Circuit Court to the Supreme Court it was done by appeal under Section 692, and the record made up under Section 698, and not under Section 997, which applies only to the record in cases of *writs of error* which were allowed under Section 691.

After a careful examination of the statutes and the rules of the Supreme Court, we have been unable to find anything that would warrant the court in finding either that assignments of error or a citation were necessary in cases of appeals in admiralty. It is perfectly clear that appeals were confined

to cases of equity and admiralty and maritime jurisdiction, and that under separate and different acts of Congress cases of common law were removed from the Circuit to the Supreme Court by writs of error, and not by appeal.

We therefore contend that under the statute and rules of the Supreme Court there is no word that provides for assignments of error or citations in admiralty appeals, and that it is therefore improper and contrary to law to require them.

The rules of the Courts of Appeal were adopted at the suggestion of the Supreme Court, and are substantially alike.

In the Second Circuit, on July 1, 1892, 50 Fed. Rep., VII., the court adopted special rules in admiralty, and an examination of these shows that no assignments of error or citation are required.

It seems to us that it is entirely clear that no reasons for an appeal need be stated in the record, on appeal to the Circuit Court of Appeals in any admiralty case. If these reasons are not necessary, then it can not matter whether the points in controversy were made in the Circuit Court of Appeals for the first time, or not.

The trial is a new one, can be had upon the amended pleadings, additional testimony and other evidence, and the case presented may therefore be entirely different from the one presented in the District Court, and yet the court has the power and it is its duty under the law to hear and determine the case as presented before it, and by its mandate direct a proper decree to be entered in the District Court.

We contend this should have been done in this case.

Respectfully submitted.

C. E. Kremer,
F. C. Harvey,
W. O. Johnson,
Proctors for Claimant.

Dated, Chicago, May, 1901.

1342

No. 97.

Bry. of Kremer & Johnson for P

Office Supreme Court U.S.
FILED
SEP 24 1902
JAMES H. McKENNEY,
Clerk.

Filed Sept. 24, 1902.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

No. 97.

UNION STEAMBOAT COMPANY, Claimant of the Propeller New York,

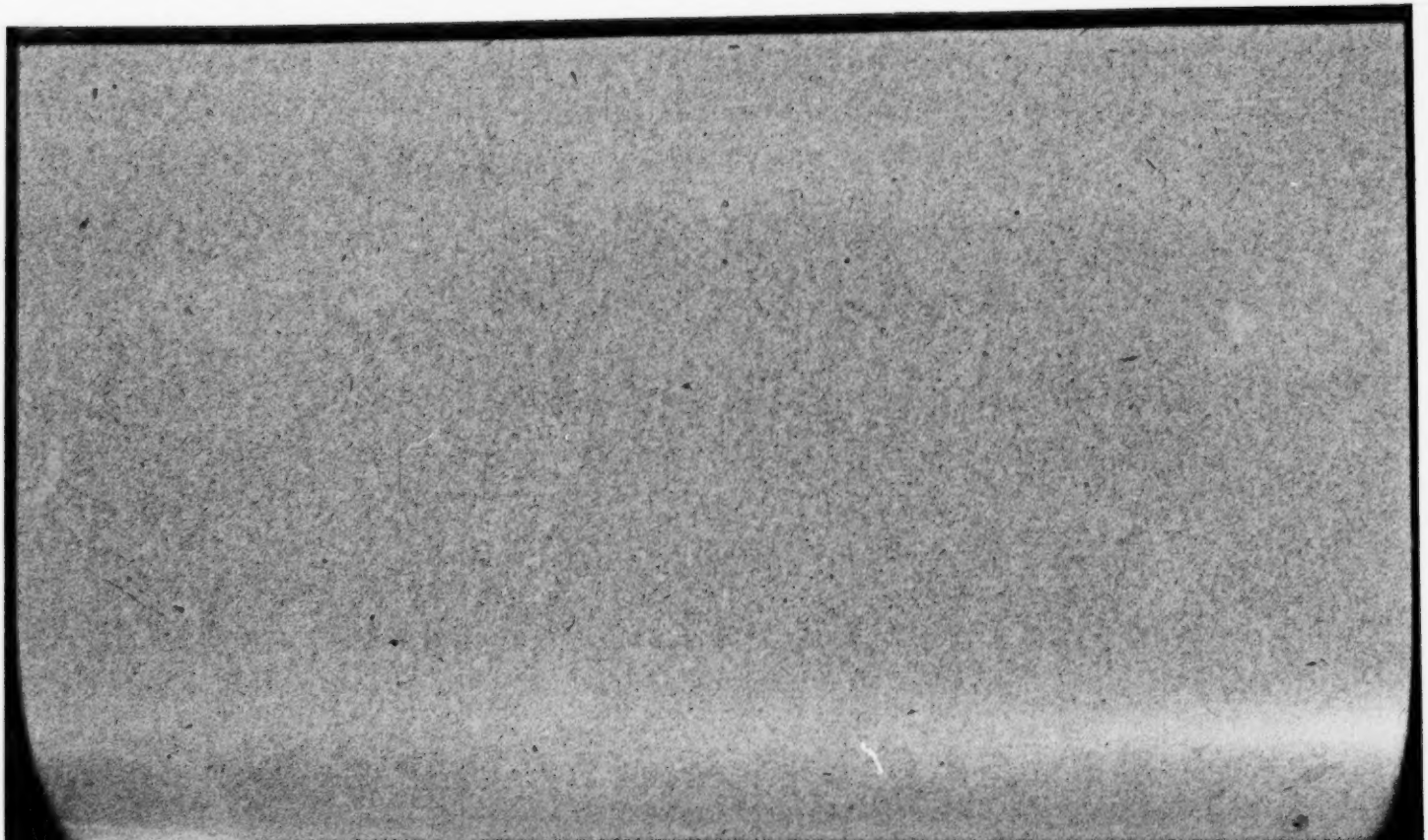
vs.

THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Libellant.

BRIEF FOR PETITIONER.

C. E. KREMER,
F. C. HARVEY,
W. O. JOHNSON.
Proctors for Petitioner.

Geo. Hornstein Co., Printers, Chicago.



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No. 97.

UNION STEAMBOAT COMPANY, Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION CO. ET AL., Libellant.

BRIEF FOR PETITIONER.

On the 11th of November, 1891, The Erie & Western Transportation Company as owner of the steamer "Conemaugh" and as bailee of her cargo filed a libel in the District Court of the United States for the Eastern District of Michigan against the propeller "New York," to recover $70,000, as the damages sustained by reason of a collision in the cost of raising and repairing the steamer "Conemaugh," the loss of her use while being raised and repaired, and the damages sustained by her cargo.

The Union Steamboat Company as claimant and owner of the propeller "New York" filed its answer to this libel, denying all liability.

Subsequently it filed its cross libel against the propeller "Conemaugh" to recover the sum of $3,000, damages sustained by the "New York" in the same collision.

No answer was filed to this cross libel. At the trial the District Court held both vessels at fault for the collision.

See,

The "New York," 53 Fed. Rep., 553.

On a motion for a rehearing, the District Court reversed its decision and held the "New York" solely at fault for the collision.

Subsequently certain insurance companies that had insured the cargo of the "Conemaugh" filed an intervening petition in the cause, claiming the following amounts as part of the damages to the cargo for which the libelant had brought suit as bailee or trustee:

British & F. M. Ins. Co. Limited	$2,421 84
Ins. Co. of North America	7,950 09
Union Marine Ins. Co	8,553 06
Marine Ins. Co	916 57

To each of these petitions, the Union Steamboat Company filed its answer denying all liability for the collision, alleging that the fault rested solely upon the "Conemaugh."

On the 25th day of January, 1895, a stipulation was entered into by the parties, finding that the damages sustained by the "New York" in the collision amounted to the sum of $3,391.19. (Rec., 12.)

The Circuit Court of Appeals reversed this decision of the District Court and found the "Conemaugh" solely at fault for the collision, and decreed that the Union Steamboat Company was entitled to recover from the libelant the amount of the damages sustained by the "New York."

The "New York," 82 Fed. Rep., 819.

The petition for a rehearing was filed and denied.
The "New York," 86 Fed. Rep., 814.

The case was then brought by writ of *certiorari* to this court, and this court held that both vessels were at fault.
The "New York," 175 U. S., 187.

On March 17, 1900, the parties entered into a stipulation (Rec., 23), which provided that the damages sustained by the parties in the case should be as follows:

Erie & Western Transportation Company, owners of propeller "Conemaugh"	$30,508.46
Erie & Western Transportation Company, trustees for underwriters on cargo other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Ltd.	2,421.84
The Insurance Company of North America	7,950.09
The Union Marine Insurance Company	8,553.06
The Marine Insurance Company, Limited	916.57
The Union Steamboat Company, owners propeller "New York"	4,341.80
	$74,319.49

On the 24th day of March, 1900, the District Court in pursuance to the mandate entered a decree (Rec., 24), by which the Union Steamboat Company, owner of the propeller "New York," should pay all of the damages sustained by the intervenors, and by the libelant as bailee of the cargo, making all of the cargo damage, and also pay one-half of the damages sustained by the "Conemaugh" herself, less the amount of the damages to the "New York" so that the Union Steamboat Company would pay 76 and 5-10 per cent. of all the damages in the case instead of 50 per cent. of the same.

Thereupon the Union Steamboat Company filed its petition in this court, praying for a writ of mandamus directed

to the Judge of the District Court, to order him to set aside the decree, and to enter a decree which would hold the owners of the "New York" for but one-half of the amount of the damages, in the doing of which, after allowing the contribution, there would still be an affirmative decree in favor of the libelant, the owners of the "Conemaugh," for $12,976.38.

This court issued an order to show cause, and upon a hearing upon the petition and answer of the District Judge, argument and briefs of counsel, the court decided on May 28, 1900, that petitioner's remedy was by appeal and not by mandamus.

See,

Ex parte Union Steamboat Company, 178 U. S., 317.

Thereupon an appeal was prayed by the Union Steamboat Company to the Circuit Court of Appeals.

A motion to dismiss the appeal was denied.

The "New York," 104 Fed. Rep., 561.

The case was then heard and the decision of the District Court was affirmed.

The "New York," 108 Fed. Rep., 102.

Note—See opinion made a part of the petition for a writ of *certiorari.*

PETITIONER'S SPECIFICATIONS.

We contend for the following:

First. We contend on behalf of petitioner that under the law, practice and procedure in Courts of Admiralty it is well settled, that in all cases of collision, when two vessels are concerned, and both are found at fault, the damages

arising out of the collision be equally divided between the owners of the respective vessels, each paying one-half of the sum.

Second. We contend that whenever one of the vessels in fault is compelled to pay the whole of the damages of a third or innocent party, that any amount above a moiety of such damages which shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value) pay one-half of all damages arising out of the collision.

Third. We contend that under the law and practice in the Admiralty Courts of the United States, it is not necessary to bring a libelant in as a co-defendant under Admiralty Rule 59 in case an intervening petition is filed by a cargo owner who was originally a party libelant, and first came into court under the original libel by the vessel owner suing for himself and as bailee of the cargo.

Fourth. We contend that whenever all the parties are before the court either as libelants or claimants and the court finds libelant's and claimant's vessels both at fault, further pleadings on behalf of the claimant like cross petitions or libels are not necessary to enable the court to grant recoupment and divide all the damages equally, even where part of the damages are awarded to an intervening cargo owner.

Fifth. We contend that it is not necessary upon an appeal from the District to the Circuit Court of Appeals, that the record should show that recoupment had been demanded by pleadings or otherwise, as the trial in the Circuit Court in such a case is a trial *de novo*.

Sixth. We contend that if, on appeal from the District to the Circuit Court of Appeals, the respondent or claim-

ant prays for recoupment which will divide the damages equally between the libelants and claimants (both vessels being held at fault), the court shall grant such recoupment, notwithstanding the fact that the record does not show that recoupment had been prayed or demanded in the District Court.

Seventh. We contend that the courts erred in holding that the rate of interest in Michigan on judgments is 7 per cent.

Eighth. We contend that interest in admiralty has never been allowed at a higher rate than 6 per cent., and that that is a uniform rate existing in all the courts of the United States without reference to the legal rate prevailing in the different states in which the courts are located.

BRIEF AND ARGUMENT.

At the time of the hearing in the District Court, after the mandate of this court, we asked the court to enter the following decree, which appears as a part of the answer of the District Judge to the order to show cause in the case of *Ex parte Union Steamboat Company, supra.* We offer this to show that the question of recoupment *was* raised in the District Court. It is as follows:

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

The Erie & Western Transportation Company, owner of the Propeller "Conemaugh," *Libelant,* The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; the Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors,* *vs.* The Propeller "New York," The Union Steamboat Company, *Claimant.*	*In Admiralty.*

On reading and filing the mandate of the Supreme Court in this case, bearing date January 22, 1900, and in obedience to said mandate, and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said propeller "Conemaugh" and the said propeller "New York" were both at fault for the collision set forth in the pleadings in this cause, and that the

damages resulting therefrom to the said libelant, the owners of the cargo of the "Conemaugh" and underwriters thereon, the intervening petitioners, and the claimant of the propeller "New York" be equally divided between the said Erie & Western Transportation and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the damages resulting from the said collision, together with interest thereon to July 3, 1896, amount to the sum of $74,319.49 and are payable to the following named and in the following proportion, viz:

Union Steamboat Company, damage to "New York"	$ 4,341.80
Erie & Western Trans. Co., damage to "Conemaugh"	30,508.56
Erie & Western Trans. Co., trustee for owners of cargo and underwriters other than intervenors.	19,627.67
British & Foreign Marine Ins. Co., Lim., Intervenors	2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

And it appearing that the above named intervenors were insurers of portions of the cargo of the "Conemaugh" and that they have suffered damages on account of said collision, as follows, viz.:

British & Foreign Insurance Co.	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and the American Surety Company, its surety, their several damages aforesaid, amounting in all

to the sum of $19,841.56, with interest thereon at the rate of 5 per cent. per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have execution therefor.

And it further appearing that the Erie & Western Transportation Company, as trustee for the underwriters and owners of the cargo of the "Conemaugh," has suffered damage by the said collision in the sum of $19,627.67, and that the Erie & Western Transportation Company, as owner of said propeller "Conemaugh," has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company for itself, and as trustee, recover from the said Union Steamboat Company and its surety one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56 hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer "Conemaugh," amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer "New York," amounting to the sum of $12,976.38, with interest thereon at the rate of 5 per cent. per annum, from July 3, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court or to the proctors for said Erie & Western Transportation Company the said sum of $12,976.38, with interest as aforesaid, and that in default thereof that it have execution therefor.

It is further ordered, adjudged and decreed that the said

Erie & Western Transportation Company recover from the Union Steamboat Company and its surety the sum of $84.12, being one-half of the costs of the Supreme Court; $276.75, less one-half of the costs of the Circuit Court of Appeals, $192.63, and further that said Erie & Western Transportation Company do recover from the Union Steamboat Company and its surety one-half of the costs in this court to be taxed, and that in default in the payment of any of said sums that the said Erie & Western Transportation Company have executions therefor against the said Union Steamboat Company and the American Surety Company.

This decree the District Court refused to enter and in place of entered the decree found at page 24 of the record, which provided that the Union Steamboat Company pay all the damage of the cargo owners and one-half of the damages sustained by the "Conemaugh."

I.

WE CONTEND ON BEHALF OF PETITIONER THAT UNDER THE LAW, PRACTICE AND PROCEDURE IN COURTS OF ADMIRALTY IT IS WELL SETTLED THAT IN ALL CASES OF COLLISION, WHEN TWO VESSELS ARE CONCERNED, AND BOTH ARE FOUND AT FAULT, THE DAMAGES ARISING OUT OF THE COLLISION BE EQUALLY DIVIDED BETWEEN THE OWNERS OF THE RESPECTIVE VESSELS, EACH PAYING ONE-HALF OF THE SAME.

It is unnecessary to cite authorities in support of this proposition, because ever since the decision of the case of *The Schooner "Catharine"* v. *Dickinson,* 17 How., 170, it has been the settled law of the United States that when the court finds both vessels concerned in a collision at fault, all of the damages are equally divided between them.

See

The "North Star," 106 U. S., 17.
The "Chattahoochee," 173 U. S.
The "Manitoba," 122 U. S., 97.
The "Albert Dumois," 177 U. S., 240.

II.

WE CONTEND THAT WHENEVER ONE OF TWO VESSELS IN FAULT IS COMPELLED TO PAY THE WHOLE OF THE DAMAGES OF A THIRD OR INNOCENT PARTY, THAT ANY AMOUNT ABOVE A MOIETY OF SUCH DAMAGES WHICH SHALL BE PAID BY SUCH VESSEL CAN BE RECOUPED OR SET OFF AGAINST ANY CLAIM FOR DAMAGES THAT THE OTHER VESSEL MAY HAVE SUSTAINED BY REASON OF THE COLLISION, SO THAT EACH VESSEL (IF SHE BE OF SUFFICIENT VALUE) PAY ONE-HALF OF ALL DAMAGES ARISING OUT OF THE COLLISION.

The right to recoup or set off, as we contend for in this case, has long been the settled law in courts of admiralty in this country. One of the earliest cases found in the books is that of *The "Eleanora,"* 17 Blatch., 88.

In that case the owners of the schooner "Transit" and the owners of her cargo, each filed a libel against the steamship "Eleanora" on account of a collision which resulted in the loss of the schooner and cargo.

The court held that both the schooner and the steamer were at fault for the collision, and, on page 104, the court, Chief Justice Waite, says:

> "Both vessels being in fault, as between themselves, the damage must be apportioned. Castner and others, who sue the 'Eleanora' alone, for the cargo, are entitled, under the rule in the case of *The 'Atlas'* (93 U. S., 302), to a decree for the full amount of their loss; and, as the 'Transit,' if she had been joined, would have been liable for one-half of this loss, *a credit may*

be allowed the 'Eleanora,' on the decree in favor of the owners of the 'Transit,' for a sum equal to one-half of the damages of the cargo. Although separate libels were filed by the owners of the vessel and the owners of the cargo, they constitute, in effect, but a single suit. They have been heard together and submitted on the same evidence. Having all parties before it, the court may do what it would have done if there had been but one libel, that is to say, divide the damages of the collision throughout between the two colliding vessels. *A formal claim, to the effect, on the part of the 'Eleanora,' is not necessary.* It is rare that, in any case, a defending vessel makes a demand for a division of damages. A complete defense is generally insisted upon in the pleadings, and the apportionment is made by the court, on the facts as they are finally developed at the hearing. It is unnecessary to decide what the rule in this particular would be if the 'Eleanora' had not been subjected in the suit for the cargo, because here she has been, and that, too, upon the very testimony submitted in the suit between the two vessels. The fund belonging to the 'Transit,' growing out of the collision, is in court, and no injustice is done by using it to reimburse the 'Eleanora' for what she has paid for the 'Transit,' on account of the mutual fault of the two vessels."

Leonard v. *Whitwell,* 10 Ben., 638:

This was a libel *in personam* by the owners of the schooner "J. M. Leonard" against the owners of the steamship "Arragon" to recover the value of the schooner, her cargo and freight.

The court held both the schooner and the steamer at fault for the collision, and on page 658 Judge Choate says:

"The owners of the schooner have an undoubted right to sue on behalf of the owners of the cargo for its value. It would seem that, so suing, their rights as bailees must be as great as if the owners of cargo joined as libelants. No final decree should, therefore,

it seems, be made which will give the libelants a smaller amount as bailees than the owners of the cargo would be entitled to receive. * * * It seems to be unnecessary to make the owners of the cargo parties, if that could be now done. They are virtually before the court through the libelants."

The "C. H. Foster," 1 Fed. Rep., 733:

In this case the owners of the schooner "Helen Marr" filed their libel against the "C. H. Foster" for the loss of the vessel and her cargo, both of which were totally lost.

The court held both vessels at fault, and although the owners of the "Helen Marr" had limited their liability under Section 4283, the court found that the owners of the "Foster could recoup one-half the damages paid to the cargo against the sum which was due from the "Foster" to the "Marr," and this without additional pleading.

In *re Leonard,* following the ruling of Judge Choate in this case in 10 Ben., 638, the court holds that even though the limited liability proceedings had been taken on behalf of the schooner, the amount to be recovered from the offending steamer could be used as a fund to indemnify the steamer for what it had paid on account of the damage to the cargo exceeding one half.

In the case of *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279, citing with approval the language of Judge Choate in 10 Ben., 638, the court, on page 282, says:

"Upon the ascertainment of the damages to the respective parties it will be competent for the court, following in principle the case of *The 'Eleanora,'* 17 Blatch., 105, to direct that the amount recoverable by the libelants in the suit *in rem* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or their representatives, the insurers, who are the libel-

ants in the present suit, and be credited upon the claim in this suit. The claims of the respective parties would indicate a possibility that one-half of the loss of the cargo, for which the owners of the bark are answerable, may exceed the amount recoverable for the loss of the bark from the steamer. Should that prove to be the case, the libelants would be entitled to a judgment in this suit against the respondents, *in personam,* for the difference; and the latter, for their own indemnity, would be entitled to a decree against the libelants in the suit *in rem* for such excess."

The "C. H. Foster," 1 Fed. Rep., 733.

The "Canima," 17 Fed. Rep., 271:

This was a libel filed by the owner of the canal boat "Redfield," and also a separate libel by the owner of her cargo of coal against the steamboat "Canima." The court found both vessels at fault, and on page 272 says:

"Duncan, the owner of the cargo, is entitled to recover his whole damages, with costs, as in the case of *The 'Atlas,'* 93 U. S., 302. But as the steamship, in paying the owner of the cargo, sustains damages to that amount, she is entitled on payment to offset this against the loss recoverable by the owner of the canal boat, so far as that will go; or, what comes to the same thing, the steamboat may charge against the sum payable to the owner of the canal boat the one-half of the damages to the cargo, which the latter ought by reason of his negligence to pay for the cargo, as in the case of *The 'Eleanora,'* 17 Blatch., 88, 105; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *Leonard* v. *Whitwell,* 10 Ben., 638, 658; *Atlantic Mutual Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279."

The "Hercules," 20 Fed. Rep., 305:

In this case two libels were filed against the steamer "Hercules," one for the total loss of a schooner and one for the

loss of her cargo. The court held both vessels at fault, and on page 206 of the opinion, Judge LOWELL says:

> "The claimants now ask that, from the damages which would otherwise be due the owners of the schooner, they should be permitted to deduct or recoup one-half of the value of the cargo, because each party is liable for that loss, according to *The 'Atlas,'* 93 U. S., 302. A recoupment of this sort has been allowed in several cases. See *The 'Eleanora,' supra; Leonard* v. *Whitwell,* 10 Ben., 638; *The 'C. H. Foster,'* 1 Fed. Rep., 733; *In re 'Leonard,'* 14 Fed. Rep., 53; *Atlantic Ins. Co.* v. *Alexandre,* 16 Fed. Rep., 279; *The 'Canima,'* 17 Fed. Rep., 271. That one vessel was wholly lost does not prevent a contribution in case of mutual default. *The 'North Star,'* 106 U. S., 17; S. C., 1 Sup. Ct. Rep., 41."

The "Job T. Wilson," 84 Fed. Rep., 149:

This was a libel by the owner of the tug "Wilson" against the steamship "Howard," and also an intervening petition by the owners of a scow in tow of the tug "Wilson" at the time of the collision.

The court held that the owners of the scow, as innocent parties, were entitled to recover from either the tug or the steamer, both having been held to be at fault for the collision, and on page 207 Judge MORRIS says:

> "It seems to me a similar injustice would be worked by permitting the owners of a vessel which is primarily liable for only one-half of the damage of an innocent sufferer to be compelled to pay the other half charged against the other vessel, and yet refusing to allow the owners of the vessel which has paid the whole to obtain the excess out of the money in their hands payable to the owners of the other vessel, for damages arising from the same collision. The whole object, as it seems to me, of the practice in admirality, which enables the court to deal with all the questions arising from a collision as

one transaction, is to prevent such inequitable results. *The 'City of New York,'* 25 Fed. Rep., 146; *The 'Canima,'* 17 Fed., 271; *The 'Hercules,'* 20 Fed., 205."

Jacobsen v. *Springer,* 87 Fed. Rep., 948:

This was a collision between the steamer "Argo" and the Norwegian steamship "Dumois." Petitions were also filed on behalf of people who were injured, and the Circuit Court of Appeals for the Fifth Circuit divided the damages, and on page 953 Judge PARDEE says:

"Finding, as we do, both the 'Dumois' and 'Argo' in fault, the decree of the District Court must be reversed, and a new decree, adjusting the damages, entered. The crew of the 'Argo' who lost their effects by the collision, are entitled to recover only half their damages from the 'Dumois,' and, as the 'Argo' was in fault, nothing from their own ship. *The 'Queen,'* 40 Fed. Rep., 694; *The 'City of Norwalk,'* 55 Fed., 102. Hester and Blesine, being passengers on board the 'Argo,' and not in fault, their representatives are entitled to recover the full damages from the 'Dumois,' but the 'Dumois' is entitled to recoup half the damages so paid. and deduct the same from the amount awarded to the owners of the 'Argo.' *The 'Hercules,'* 20 Fed., 205; *The 'North Star,'* 106 U. S., 17, 1 Supt. Ct., 41. The 'Argo,' being a total loss, can recover one-half her value from the 'Dumois,' less one-half the damages suffered by the 'Dumois,' shown by the record to be $185. Decreed accordingly."

This last case was affirmed by this court in *The "Albert Dumois,"* 177 U. S., 240.

"The Livingstone," 104 Fed. Rep., 918.

We are satisfied that the District Court was misled in the construction of the opinion of the Supreme Court by the quotation made by the latter from the case of the *"Juniata,"* 93 U. S., 337, in this language:

"Whatever their rights may be as against Pursglove by reason of such payment of more than half must be settled in another proceeding. It can not be done in this litigation."

In this case an original and separate libel was filed by the United States as owner of a certain scow against the steamer "Juniata" alone. The collision in the case was between the "Juniata" and the "Neafie," and a separate suit had been brought by Pursglove, owner of the "Neafie," against the "Juniata." Neither the "Neafie," nor Pursglove, her owner, had been made a party *to this suit,* therefore, when the court found the "Neafie" and the "Juniata" both at fault for the collision, it held that the United States, as the owner of the innocent scow in its suit against *the "Juniata" alone* must recover its full damage against the latter, and could not have a joint decree against *the "Juniata" and the "Neafie"* or Pursglove, as the owner of the latter, *because neither the "Neafie" nor Pursglove had been made a party to the libel filed by the United States against the "Juniata."*

The court, therefore, said that in this proceeding no one could be reached but the "Juniata," the only defendant in the case, and that, therefore, if Pursglove or the "Neafie" were to be reached, it must be in a separate proceeding.

The case of the "Juniata" would be in point if the owners of the cargo of the "Conemaugh" had filed an original and separate libel against *the "New York" alone;* then, unless the "Conemaugh" had been made a party to this libel, the decree must run for the whole amount against the "New York," and there would in that case be no opportunity to offset or recoup against the "Conemaugh" because the latter was not a party to the suit.

In this case, however, the intervenors came in under a proceeding in which the owners of the "Conemaugh" were libelants, and the owners of the "New York" claimants.

The other owners of the cargo of the "Conemaugh" have brought their suit in the name of the owners of the "Conemaugh." All parties in interest are, therefore, before the court either as parties libelant or respondent.

The owners of the "Conemaugh" as libelant, after the court has found that the libelant and claimants are jointly liable each for a moiety of the damages, would be estopped from saying that for the cargo damaged no recovery could be had against it, because it, the libelant, had not been made a party defendant by the owner of the cargo.

The "Livingstone," supra.

III.

WE CONTEND THAT UNDER THE LAW AND PRACTICE IN THE ADMIRALTY COURTS OF THE UNITED STATES, IT IS NOT NECESSARY TO BRING A LIBELANT IN AS A CO-DEFENDANT UNDER ADMIRALTY RULE 59 IN CASE AN INTERVENING PETITION IS FILED BY A CARGO OWNER, WHO WAS ORIGINALLY A PARTY LIBELANT AND FIRST CAME INTO COURT UNDER THE ORIGINAL LIBEL BY THE VESSEL OWNER SUEING FOR HIMSELF AND AS BAILEE OF THE CARGO.

The Circuit Court of Appeals held that when the intervening petition was filed by the underwriters of a part of the cargo of the "Conemaugh," that the "New York" might have availed itself of Admiralty Rule 59, and brought the "Conemaugh" in as a party respondent and as a vessel in fault, which also ought to be proceeded against for cargo loss, and cites in support of this proposition *The "Beaconsfield,"* 158 U. S., 303, 307.

When these petitions were filed, the "New York" took the only consistent position which it could take under the answer filed to the original libel, namely: that she was not at fault for the collision, and that the "Conemaugh" was the vessel that was guilty of all the fault.

It would have been an anomalous position to have said in one answer in the case that the "New York" was not at fault and the "Conemaugh" solely at fault; and in another answer to allege that both of the vessels were at fault, or that the "New York" might be at fault as well as the "Conemaugh" and that in such a case the damages should be divided.

Suppose such an answer had been filed. It would not have aided the court in the least in arriving at a division of the damages. It would have operated no more than a suggestion that in case both vessels were held at fault, that both should pay the damages sustained by the intervenors.

The case of *The "Beaconsfield"* is not in point, because in that case the only original libel was filed by the master and owner of the "Beaconsfield" for damages to the "Beaconsfield's" cargo *alone* against the "Brittania" *alone*, the latter claiming that the "Beaconsfield" was also at fault (she not being made a party libelant), brought her in under Admiralty Rule 59. This was necessary, because the "Beaconsfield" was not a party to the suit. Her owners and master were suing in the capacity of trustees and not as owners, and there could be no offset against them in that capacity, and it was absolutely necessary, if the "Beaconsfield" was to share a portion of the loss, or to bear all of it, that she should be brought in as a party defendant.

In this case, the owners of the "Conemaugh" were in court not alone as bailees or trustees, but as owners of the "Conemaugh," and therefore, were as much in court as a party libelant, as they could possibly be as a party defendant, and the court was perfectly competent to do in this case, what had been done in all of the cases cited in this brief, and in all cases that we have ever known of, viz.: to recoup and offset the damages, so that the innocent parties

would recover all of their damages, and the owners of the "Conemaugh" and "New York" would divide the loss equally between them.

The case of *The "Livingstone,"* 104 Fed. Rep., 918, is directly in point. In that case the libel was filed by the owners of the sunken steamer "Grand Traverse" against the "Livingstone" to recover the cargo damages as well as the damage to the libelant's vessel.

The court held that it was not necessary to bring the owners of the "Traverse" in under Rule 59, nor were pleadings in the form of the cross libels or petitions necessary. The stipulation in that case, like in the case at bar, estops the libelants from setting up any defense to the claim of the intervening cargo underwriters.

Recoupment has always been allowed without further pleadings and there was no more necessity for pleadings in this case than in any other.

There is not a case in the books nor in any text or form books, that states that such a proceeding or any proceeding in a case like this is necessary to enable the court to grant recoupment and adjustment of the payment of the damages so that they will be paid in equal amounts by the libelant and respondent.

IV.

WE CONTEND THAT WHENEVER ALL THE PARTIES ARE BEFORE THE COURT, EITHER AS LIBELANTS OR CLAIMANTS, AND THE COURT FINDS LIBELANTS' AND CLAIMANTS' VESSELS BOTH AT FAULT, FURTHER PLEADINGS ON BEHALF OF THE CLAIMANT, LIKE CROSS PETITIONS, OR LIBELS, ARE NOT NECESSARY TO ENABLE THE COURT TO GRANT RECOUPMENT, AND DIVIDE ALL THE DAMAGES EQUALLY, EVEN WHEN PART OF THE DAMAGES ARE AWARDED TO AN INTERVENING CARGO OWNER.

The District Court, in its return to the order to show cause (having written no opinion in the case), held that the pleadings were of such a character that decrees could not be entered which would permit the recoupment, and that under the form of the decree offered and urged by the Union Steamboat Company, the petitioner herein would obtain direct affirmative relief against the libelant for the sum of $6,621.88, and that such affirmative relief could not be had or obtained because of the absence of pleadings on behalf of the Union Steamboat Company praying such relief.

We contend that no further pleadings were necessary. In all of the cases of recoupment that we have been able to find in the books, there is not one of them that speaks of any additional pleadings.

The facts in the case of *The "Eleanora,"* 17 Blatch., 88, are similar to the facts in this case. There the owners of the "Eleanora" did not file any answer to the libel of the owners of the cargo of the "Transit," setting up the joint fault of the "Transit," or that she should contribute to any loss that the "Eleanora" might have to pay to the cargo owners. The court, however, had no difficulty in settling the damages, so that each party was held and paid one-half.

In the case of *The Atlantic Mutual Insurance Company*

v. *Alexandre,* 16 Fed. Rep., 279, the court say that if the amount paid to the cargo should exceed the amount to be recovered for one-half of the vessel, then:

> "Should that prove to be the case, the libelant would be entitled to a judgment in this suit against the respondents *in personam,* for the difference, and the latter for their own indemnity be entitled to a decree against the libelants in the suit *in rem* for such excess."

In none of these cases does it appear that any additional pleadings, except libels and answers, were filed.

The court, however, having all the parties before it and control of the fund, could so distribute it, and under such decrees as would result in the payment of all the damages, and a proper division of them among the parties liable.

When the decision of this court was reversed by the Supreme Court and both vessels were held at fault, then we contend no further pleadings were necessary, because the court decided both vessels at fault, which made an equal division of the damages. All the parties that were to bear these damages were before the court, either as libelant or claimant.

Let us suppose that further pleadings had been filed; they would have consisted of a sort of cross libel, or cross petition in which the "New York" would set up the payment of the cargo damages, and a prayer that these damages might be recouped against the claim of the "Conemaugh," either as libelant and owner, or as libelant, trustee or bailee. Such a petition could not be filed until after payment had been made. It would then be too late.

We could therefore see no useful purpose that such a petition or cross libel could serve.

If any injury could occur, or if a stranger to the controversy here was affected by such a decree as we contend for,

the case would be different. But no third part is in any way interested.

We therefore contend that no further pleadings are necessary in order to secure an equal division of the damages in this case.

The libelant by its contention is practically placed in the position of saying, that so much of the cargo as is represented by it as bailee or trustee can not recover against it, because it, the libelant, has not been made a party defendant by itself, the libelant trustee.

The libelant can not claim any benefit or advantage by reason of its dual position. It can not as libelant owner of the "Conemaugh" say to itself as libelant bailee that it will not pay one-half of the damages sustained by it as bailee of the cargo. It is as much liable as a party libelant in this suit as it would be as a party defendant. It is as much before the court in the one case as in the other, as much subject to the process and orders of the court, and we can see no advantage that could be gained by having the libelant also made a defendant in the same suit in which it is already a party libelant.

The objection made here is purely technical. All the questions in the case could have been settled in the District Court, as all the parties in interest were before the court.

Upon this question of further pleadings the case of *The "Eleanora,"* 17 Blatch., 83, cited at length herein, is directly in point.

See, also,

The "Livingstone," 104 Fed. Rep., 918.

Leonard v. *Whitwell,* 10 Ben., 638.

The "C. H. Foster," 1 Fed. Rep., 733, and the other cases cited in our brief.

The case of *The "Manitoba,"* 122 U. S., 97, in many particulars resembles the case at bar.

In that case the owners of the propeller "Comet" libeled the "Manitoba" for the following damages:

The value of the "Comet"	$30,000
The value of her cargo	35,000
The value of her freight	5,125

The court held both vessels at fault, divided the damages, and in doing so added together the total damages claimed by the libelant, and to these the damages sustained by the "Manitoba," and then entered a decree in favor of the libelant for one-half of these against the "Manitoba." The amount recovered, however, was less than the amount awarded, because of the limited liability proceedings which had been taken in the interests of the "Manitoba."

It does not appear in that case that any pleadings were filed by the owners of the "Manitoba" against the owners of the "Comet" to recover the damages sustained by the owners of the "Comet's" cargo. We doubt this ever having been done in any case. We certainly have had no such experience, nor have we been able to find any case of the kind in the books.

Libelant furnishes no precedent or authority to sustain the position that the court can not now, under the present state of the pleadings, grant the relief asked and do full and perfect justice to all the parties in interest.

In the case at bar, the decree we asked to have entered for the payment of all the damages of the intervenors, namely $19,841.56, by the Union Steamboat Company, and for a further recovery by the libelant from the Union Steamboat Company of the sum of $12,976.38, which, together, amounts to the sum of $32,817.94, one-half of the total damages sus-

tained in this case. This leaves the libelant to account to the owners of the cargo represented by it as trustee either for the whole or a part of the damages, if by any private arrangement or contract its liability was lessened.

Why should Courts of Admiralty, which up to this time have been Courts of Justice unhampered by the artificial pleadings, petitions, issues and other means often resorted to by courts of common law to thwart and defeat the ends of justice, be hampered by such things as the formal pleadings which are now advocated? For what purpose are they advocated? Not to promote justice and speedy relief, but to retard and obstruct it, and if possible defeat in this case the well settled rule of law that each party must bear one-half of the damages.

Here the owners of the cargo are not in court as independent and original libelants, but are represented by the owner of the "Conemaugh." The owner of the "Conemaugh," as libelant, after the court finds that the libelant and claimant are jointly liable each for a moiety of the damages, will be estopped from saying that this amount can not be recovered of it, because it, the libelant, was not made a party defendant by the owners of the cargo.

In other words, the libelant can not defeat the claim of *libelant as trustee* because as such trustee it did not make the libelant a party defendant. Neither can the libelant defeat the claim of the claimants for contribution because the latter did not make the libelant a party defendant.

The object of a pleading is to form an issue. In a case of this kind after the court had found both vessels at fault, all issues were determined and no new issues could be raised by any further pleadings that could be filed. The right of contribution existed of course, and could be enforced under the pleadings then on file in the case. More pleadings could

serve no useful purpose, as everything appears of record, and they would therefore be only an unnecessary incumbrance of the record.

Courts of admiralty have always favored the directest course, and simplest methods in arriving at the distribution and contribution of damages in collision cases.

A very able review of the authorities touching the point of additional pleadings is found in case of *Ebert* v. *The Schooner "Reuben Doud,"* 3 Fed. Rep., 520, and it seems to us that *The "Sapphire,"* 18 Wal., 51, as well as the case of *The "Pennsylvania,"* 12 Blatch., 67, Sc. 19 Wal., 125, were also in point.

In these cases, it has practically been held that a cross libel is not necessary if it appear from the answer that the respondent has suffered damages. Such damages can be recouped without a cross libel.

This is not necessarily in conflict with the authorities that hold that to obtain affirmative relief a cross libel is necessary.

In this case affirmative relief is not demanded, but the libelant is to recover a decree for a considerable amount in settling the damages arising out of the collision.

Courts of Admiralty in England have been equally liberal in this respect.

The "Seringapatim," 3 Wm. Rob., 38:

In this case the cross action had been abandoned and after the court had held both vessels at fault. Dr. Lushington, in his opinion, says:

> "Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to

> the amount of the compensation to which the owners of the 'Hariet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages, sustained by the owners of the 'Seringapatim."

With all the parties before the court, we claim that no further or other pleadings are necessary.

In the case of *The "Livingstone,"* 104 Fed. Rep., 918, the proctor for the appellee made the same point that he is making here, but the District Court for the Western District of New York held that the libelant must account to the owner or underwriter of his cargo in the same manner as if made a party defendant, although not such by cross libel, petition or answer. This is no hardship. If successful and he recover all he must account to the cargo owner.

V.

WE CONTEND THAT IT IS NOT NECESSARY, UPON AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THAT THE RECORD SHOULD SHOW THAT RECOUPMENT HAD BEEN DEMANDED BY PLEADINGS OR OTHERWISE, AS THE TRIAL IN THE CIRCUIT COURT, IN SUCH A CASE, IS A TRIAL *de novo*.

We claim we are entitled to a new trial and that a trial *de novo* gives the appellants the right to be heard upon any point that can be raised upon the record, and it is entirely immaterial whether this record shows that the same point had been raised in the District Court or not, and that even if it had not been raised in the District Court, the Court of Appeals should consider it though raised for the first time on appeal. This court has never passed upon this question since the passage of the Act of 1891.

As to Trial *de Novo*.

The Act of Congress of March 3, 1891, establishing the Circuit Court of Appeals, provides in Section 11 as follows:

> "And all provisions of law now in force regulating the methods and systems of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals."

This section left the mode of procedure in appeal cases in admiralty from the District Court in substantially the same condition and under the same practice as existed at the time of the passage of the act.

The Act of Congress passed February 16, 1875, and entitled: "An Act to facilitate the disposition of cases in the "Supreme Court and for other purposes," is expressly repealed by the 14th Section of the Act of 1891, as are also all acts or parts of acts inconsistent with the provisions for review by appeals in Section 5 and 6 of the act.

While, under the Act of 1875, it was the duty of the Circuit Court in case of appeals in admiralty to the Supreme Court, to make findings of fact, these provisions did not affect the procedure in appeals from the District Court to the Circuit Court, and it was held in the case of *The "Havillah,"* 48 Fed. Rep., 684, that in appeals from the Circuit Court to the Circuit Court of Appeals, even after the passage of the Act of 1891, findings of fact as provided by Act of 1875 were not necessary.

Section 30 of the Act of Congress, September 24, 1789, provides that on appeals in admiralty from the District to the Circuit Court, the same witnesses who were examined in the former might be re-examined in the latter. This

provision of the laws was omitted in revision of 1874, and we find in the Revised Statutes, Section 631, as follows:

> "From all final decrees of the District Court in causes of equity, of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of $50, exclusive of costs, an appeal shall be allowed to the Circuit Court, next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632: "In case of an appeal as provided by the "preceding section, copies of the proof and such entries "and papers on file *as may be necessary* on hearing of the "appeal may be certified up to the Appellate Court."

Section 862, passed August 23, 1842, provides: "The "mode of proof in causes of equity and admiralty and mari- "time jurisdiction shall be according to rules now or here- "after prescribed by the Supreme Court, except as herein "specially provided."

Under this act the Supreme Court formulated Admiralty Rules 49 and 50. The first of these rules provided for the taking of depositions in the Circuit Court, and Rule 50 requires that the oral evidence shall be taken down by the Clerk of the District Court, pursuant to the Act of Congress, 1789, and this shall be transmitted to the Circuit Court and used in evidence on appeal, and it then proceeds as follows: "Saving to each party the right to take the "deposition of the same witnesses, or either of them, if he "should elect." Rule 52 specifies how the records in appeals in admiralty to the Circuit Court shall be made up, and this rule is expressly recognized by Rule 6 of the Courts of Appeals.

It will be noticed that the last, the 11th section, of this rule, is as follows: "The prayer for an appeal and the ac-

"tion of the District Court thereon, *and no reasons of ap-*
"*peal shall be filed or inserted in the transcript,*" *and then follows what shall be omitted.*

This is substantially all the statutory law and the rules made in pursuance of the statutes that bear upon this subject. We will now proceed to take up the decisions of the various Circuit Courts and of this court, upon the question of whether on an appeal from the District to the Circuit Court there was a trial *de novo,* and whether under the Act of 1875, and the Act of 1891, the trial in a case on appeal from the District to the Circuit Court of Appeals shall be a trial of *de novo.*

In the case of *Yeaton* v. *U. S.,* 5 Cranch, 283, Chief Justice Marshall says:

> The majority of the court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the Appellate Court be pronounced. The cause in the Appellate Court is to be heard *de novo,* as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the District to the Circuit Courts of the United States, but in this court also."

The Steamer "Saratoga" v. 438 *Bales of Cotton,* 1 Woods, 75. This was a case in which the libelant recovered the sum of $900, and then took an appeal from the District to the Circuit Court. The Circuit Court dismissed the libel, whereupon the libelant contended that inasmuch as the claimant had not appealed from the decree of the District Court, the decree for $900 in favor of the libelant must stand.

Judge Woods says the following:

"When libelants appealed, the appeal opened the

whole case. They can not be allowed to claim the benefit of the decree below, and, standing secure on that, try their fortunes in this court. In admiralty cases an appeal suspends the decree altogether. It is not *res adjudicata* until the final sentence of the Appellate Court is pronounced. *The 'Roarer,'* 1 Bl., C. C. I., *Yeaton* v. *The United States,* 5 Cranch., 281. The cause in the Appellate Court is to be heard *de novo,* as if no decree had been passed. We do not find these views opposed to the authorities cited by libelants. In fact, those authorities do not seem to touch the question at all."

In the same court by Pardee, J., *"Lillie,"* 42 Fed. Rep., 179; *The "Cassius,"* 41 Fed. Rep., 367.

The case of *The "Lucille,"* 19th Wall., 73:

In this case Mr. Justice Miller, on p. 74, says:

"An appeal in the admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated, a new trial, in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be enforced by the order of that court and the record remains there."

In the case of *The "Charles Morgan,"* 115 U. S., 69, Mr. Chief Justice Waite, after approving the language used by the Supreme Court in the case of *The "Lucille,"* states that the parties had a right in the Circuit Court to amend their pleadings and cites a number of cases upon this point.

The case, however, which is directly in point, is that of *Irvine* v. *The "Hesper,"* 122 U. S., 256. In that case the District Court awarded the libelant a certain sum for salvage, and an appeal was taken by the libelants, but the claimants failed to perfect their appeal. The Circuit Court

awarded a sum less than that awarded by the District Court. Thereupon the libelants appealed to the Supreme Court, which affirmed the decree of the Circuit Court. On p. 266 Justice Blatchford says:

> "The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court."
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> *Yeaton* v. *U. S.*, 5 Cranch, 281.
>
> Anonymous, 1 Callison, 22.
>
> *The "Roarer,"* 1 Blatchford, 1.
>
> *The "Saratoga"* v. 438 *Bales of Cotton,* 1 Woods, 75.
>
> *The "Lucille,"* 19 Wall., 72.
>
> *The "Chas. Morgan,"* 115 U. S., 69, 75.

> "We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."
>
> *The "Hesper,"* 18 Fed. Rep., 696.

The "Philadelphian," in the Circuit Court of Appeals for the First Circuit, 60 Fed. Rep., 423:

In this case the court held that the provisions of the Judiciary Act of 1875 did not apply to the Circuit Court of Appeals in cases of appeals from the District Court, approving the decisions of the court in *The "Havillah,"* 48th Fed.

Rep., and the court repeats the language used by the Supreme Court in the case of *"Lucille,"* viz.: "That there is a "new trial, completely and entirely new, with other testi- "mony and other pleadings, if necessary, or if asked for."

The "Louisville," 154 U. S., 657. In this case Mr. Chief Justice Waite delivered the following:

> "An appeal in admiralty from the District Court to the Circuit Court vacates the decree appealed from. The case is heard *de novo* in the Circuit Court, without any regard to what was done below. An entire new decree is entered, which the Circuit Court carries into execution. The cause is not remanded to the District Court. After the suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally begun in that court."
>
> *The "Lucille,"* 19 Wall., 74.
>
> *Montgomery* v. *Anderson,* 21 How., 388.
>
> *Yeaton* v. *United States,* 5 Cranch, 283.
>
> *Nelson* v. *White,* 83 Fed. Rep., 215, decided by the Circuit Court of Appeals for the 9th Circuit.

In this case it is held by the court and stated as follows:

> "It is a well settled rule that an appeal in admiralty is to all intents and purposes a trial *de novo.*"

The court further holds that the judiciary act of 1875 does not apply to the admiralty appeals from the District Court to the Circuit Court of Appeals.

> *Singlehurst* v. *La Campagnie Gen. Trans.,* 50 Fed. Rep., 104.
>
> *Pettie* v. *Boston Tow Boat Co.,* 49 Fed. Rep., 464.
>
> State of California, *Ibid.,* 172.

In the late case of *Gilchrist* v. *The Chicago Insurance Company,* 104 Fed. Rep., 566, Mr. Justice Harlan holds that

in appeals in admiralty from the District to the Circuit Court of Appeals, there is a trial *de novo*.

In this case the libelant appealed from the decree in his favor in the District Court. The respondent did not appeal.

It was contended on behalf of the libelants that the respondents could not be heard except in defense of the decree, whereas respondents contended that the appeal gave them a trial *de novo* in the Circuit Court of Appeals and that they could be heard upon all the defenses which were interposed in the District Court.

On page 571 the court say:

> "We do not think that the rule has been changed by the above act of March 3, 1891, under which an appeal from the District Court goes to the Circuit Court of Appeals, and not to the Circuit Court. The clause in that act (section 11) that 'all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Court of Appeals, does not prevent a Circuit Court of Appeals, when hearing an appeal in admiralty, from exercising all the power that a Circuit Court could have exercised in a like case prior to the act of 1891. On the contrary, that clause implies that an admiralty appeal by the libelant in the Circuit Court of Appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the Circuit Courts prior to the passage of that act. It results that this court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libelants are not entitled to a decree in any amount,—and such is the contention of the underwriters,—we

may dismiss the libel, notwithstanding the underwriters did not themselves directly appeal from the decree."

In the recent case of the *Graham & Morton Transportation Co.* v. *The Chicago Insurance Co.*, 108 Fed. Rep., 271, the United States Circuit Court of Appeals for the Seventh Circuit in part reiterated what was said in the last case, and practically held that assignments of error were not necessary in case of an appeal in admiralty.

VI.

WE CONTEND THAT IF, IN CASE OF AN APPEAL FROM THE DISTRICT TO THE CIRCUIT COURT OF APPEALS, THE RESPONDENT OR CLAIMANT PRAYS FOR RECOUPMENT WHICH WILL DIVIDE THE DAMAGES EQUALLY BETWEEN THE LIBELANTS' AND CLAIMANTS' VESSELS, BOTH BEING HELD AT FAULT, THE COURT SHALL GRANT SUCH RECOUPMENT, NOTWITHSTANDING THE FACT THAT THE RECORD DOES NOT SHOW THAT RECOUPMENT HAD BEEN PRAYED OR DEMANDED IN THE DISTRICT COURT.

If there is a trial *de novo* as we have shown by the authorities cited, under the preceding point, then appellant had a right to ask the appellate court to grant recoupment and remand the case for the entry of such a decree as would properly divide the whole damage arising out of the collision equally between the libelant and claimant.

An assignment of error is filed in this case which brings up the question of recoupment.

It may be doubted, however, if an assignment of error even is necessary. We believe that no reason for an appeal is necessary under the present law and rules of the Court of Appeals.

Prior to the Act of 1891, appeals in admiralty went from the District to the Circuit Court, under Section 631 of the Revised Statute, which provides as follows:

> "From all final decrees in the District Court in cases of equity or *of admiralty and maritime jurisdiction,* except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, *an appeal* shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear and determine such appeal."

Section 632 provides as to the record on appeal:

> "In case of an appeal as provided by the preceding section, copies of the proofs, and of such entries and papers on file *as may be necessary* on hearing of the appeal, may be *certified* up to the appellate court."

In the case of the *United States* v. *Monson,* Case No. 16750 Fed. Cas., Mr. Justice Story, in reviewing the right to appeal from a District to a Circuit Court, under the Acts of 1789 and 1803 said that *no appeal* lies from the District to the Circuit Court, except in cases of admiralty and maritime jurisdiction, and that a writ of error is the proper process to correct the errors of the District Court in common law actions.

In a very able and exhaustive opinion on the difference between an appeal and a writ of error, among other things the learned Justice said:

> "The remedy by appeal, as known and practiced in England, is in a great measure confined (for I speak not of summary proceedings before magistrates, or appeals of death or robbery) to causes of equity, ecclesiastical and admiralty jurisdiction; in all of which no jury intervenes. In the courts possessing these respective jurisdictions, the Judge is in general the sole arbiter of the fact and of law, and the mode of proceeding is borrowed, almost exclusively, from the civil law. It is undoubtedly true that in courts proceeding according to the course of the civil law, an appeal from an inferior to a superior tribunal removes the whole pro-

ceedings, and usually, though not invariably, opens the facts as well as the law to re-examination. (*Wiscart* v. *D'Auchy*, 3 Dall (3 U. S.), 321.)"

U. S. v. *Nourse*, 6 Pet., 470.

U. S. v. *Haynes*, 2 McLain, 155

Section 6 of Rule 14 of the Court of Appeals for the Sixth Circuit provides:

> "The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court."

Under the Act of 1842 the Supreme Court promulgated General Admiralty Rule 52. Section 11 of this rule provides:

> "The prayer for an appeal and the action of the District Court thereon *and no reasons for the appeal shall be filed or inserted in the transcript.*"

It also provides that the certificate of the Clerk is all that is needful to complete the record.

Assignments of error are only proper in cases of review by writs of error as at common law, and the service of citations also applies only to cases of writs of error. A writ of error is a new suit instituted to review the decision of the inferior court.

Under the practice that prevailed prior to the organization of the Circuit Court of Appeals, in appeals from the District to the Circuit Court, it was not the practice to issue a citation, or to serve the same, because the case was up by appeal and not by writ of error. So held in *The "Ellen,"* 4 Blatch., 107.

Let us trace the origin of the rules of the appellate courts on this subject.

Rule 14 of the Court of Appeals was copied from Rule 8 of the Supreme Court. Let us compare:

The first sections are identical, except that there is added to the rule in the Court of Appeals that the Clerk may require a præcipe of the appellant or plaintiff in error.

Sections 2, 3 and 4 are identical. Section 5 as to citations is changed but slightly, and the change amounts to this, that they shall be in all cases made returnable in thirty days from the date thereof, instead of the first day of the term.

Section 6 is changed because under the Act of 1875 in appeals from the Circuit to the Supreme Court, the Supreme Court merely passed upon the findings of fact by the Circuit Court, and the questions of law arising upon these.

We quote at length Section 5 of Rule 8 of the Supreme Court to show that that rule provided merely for a citation in case of a writ of error, *and not in cases of appeal.*

> "In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, *the writ of error and citation,* if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day."

We also insert here Section 5 of Rule 14 of the Circuit Court of Appeals:

> "All *appeals,* writs of error and citations must be made returnable not exceeding thirty days from the date on which the *appeal* is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident, the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be

discharged unless another resident be designated of record in the case upon whom service may be had."

It will be noticed that the section begins with the words "All appeals, writs of error, and citations must be made "returnable not exceeding thirty days."

It is apparent, when reading both the rule from which Section 5 was copied and Section 5 itself, that the citation was not intended to apply to appeals at all, and that whoever framed these rules lost sight of the difference between writs of error and appeals, and that the rule should be read with the word "appeals" in the first line stricken out.

There certainly is no sense in saying that an appeal must be made returnable from a certain date. The appeal goes as a matter of right, and no citation should be necessary. Ordinarily an appeal runs to the next term of the appellate court.

We have always contended that the citation was unnecessary, but have used it merely to be on the safe side of the practice.

In Benedict's Admiralty we find the following:

"SECTION 628. In my opinion, the practice of making an assignment of errors is inappropriate to the admiralty. It is appropriate to the common law system, in which the theory is that questions of fact are to be determined by a jury, and are not to be reviewed by the appellate court, whose function is only to review the errors made by the Judge below, who has only matters of law to determine."

"SECTION 629.—ALLOWANCE OF APPEAL: The words of the 11th General Rule that 'no appeal shall be allowed until such assignment of errors is filed,' would seem to require an allowance of an appeal. Such an allowance in terms has not thus far been held to be indispensable, and the right to an appeal would seem to be a statutory right and therefore not subject to an

allowance or disallowance. The approval of the bond and the signing of the citation would probably be held to be an allowance of the appeal. But it is well to have the judge who approves the bond also in terms allow the appeal, in order to avoid question."

We can find no warrant, however, for the author's statement that a citation was required on an appeal in admiralty from the Circuit Court to the Supreme Court prior to the Act of 1891.

The rule of court certainly does not require it. Neither does the statute. We can find no reference to a citation, except in Section 5 of Rule 8, and this applies, as we have shown before, to final judgments and *not decrees,* and has reference only to writs of error, the words "writ of error and citation" always being found together.

So that, notwithstanding the 8th rule of the Court of Appeals providing that the practice, so far as may be, shall be the same as in the Supreme Court of the United States, no practice not required by law or the rules of that court can be held to be such practice as was intended to be adopted by this rule.

Citations may have been used, and in this way a practice to use them may have grown up and the court may have known of this, but there is nothing in either the statute or the rules of the court requiring it, and therefore it is not a rule of the Court of Appeals.

Under the former practice in taking appeals in admiralty cases from the Circuit Court to the Supreme Court it was done under Section 692, and the record in such cases was made up under Section 698, and this record did not require assignments of error or citations.

There are numerous decisions by the Supreme Court in the books in which the question of the necessity for issuing

and serving a citation in an appeal from the Circuit to the Supreme Court has come up.

Barril v. *Prop. "Mohawk,"* 3 Wall., 424.
Dayton v. *Lash,* 4 Orto., 112.
Str. "Douro," 3 Wall., 564.
C. & P. R. R. Co. v. *Blair,* 100 U. S., 661.
Vansant v. *Gas L. Co.,* 99 U. S., 213.
Farrar v. *Churchill,* 135 U. S., 609.

In some of these cases it is difficult to determine from the report of the case whether the case was one of common law or equity.

There seems to be running through these cases an indifference to the distinction between a writ of error and an appeal, and frequently the parties before the Supreme Court have been called appellants and appellees without reference to the fact that they were in that court as plaintiffs and defendants in error, and not as appellants and appellees.

In one case, that of *Farrar* v. *Churchill,* 135 U. S., 609, 10 Sup. Ct. Rep., 772, the court holds that in case of an appeal (which indicates that it is an equity case) assignments of error were necessary under Section 997.

This was a case in which a bill was filed in equity and subsequently a cross-bill, and by appeal the case was removed to the Supreme Court.

In addition to this the court quotes liberally from Supreme Court Rule 21, but seems to have lost sight of the difference between an appeal and a writ of error, and holds that there should have been an assignment of errors in the case, as required by Section 997. Section 997 is as follows:

> "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of

> the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

It will be noticed that this refers to writs of error exclusively and does not refer to appeals in chancery or admiralty cases.

Writs of errors are allowed under Section 691, which is as follows:

> "All final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from courts of the several states, and all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court on a writ of error."

A careful reading of Rule 21 preserves the distinction between an appeal and a writ of error, and in cases of writ of error refers to an assignment of errors, while in cases of appeal it refers to the specifications of error.

It has been held by this court that where the appeal is not prayed in open court a citation is necessary. We have seen that there is no rule or statute which requires a citation, and the purpose and object of the citation, as required by the various decisions of the court, is more in the nature of a notice to the opposite party that an appeal has been taken than process which would bring the case properly before the court.

In cases of appeal no process need be issued because the proceeding is a removal of the pending cause to a higher court, whereas the writ of error is the bringing of a new suit for the purposes of reviewing the actions of an inferior court.

After a careful examination of the statutes and the rules of the Supreme Court, we have been unable to find anything that would warrant the court in finding either that assignment of errors or a citation were necessary in cases of appeals in admiralty. It is perfectly clear that appeals were confined to cases of equity and admiralty and maritime jurisdiction, and that under separate and different acts of Congress cases of common law were removed from the Circuit to the Supreme Court by writs of error, and not by appeal.

We therefore contend that under the statute and rules of the Supreme Court there is no word that provides for assignments of error or citations in admiralty appeals, and that it is therefore improper and contrary to law to require them.

The rules of the Courts of Appeal were adopted at the suggestion of the Supreme Court, and as substantially alike.

In the Second Circuit, on July 1, 1892, 50 Fed. Rep., VII, the court adopted special rules in admiralty, and an examination of these shows that no assignment or errors or citation are required.

It seems to us that it is entirely clear that no reasons for an appeal need be stated in the record, on appeal to the Circuit Court of Appeals in any admiralty case. If these reasons are not necessary, then it can not matter whether the points in controversy were made first in the District Court or in the Circuit Court of Appeals for the first time, or not.

The trial is a new one, can be had upon the amended pleadings, additional testimony and other evidence, and the case presented may therefore be entirely different from the one presented in the District Court, and yet the court has the power, and it is its duty under the law, to hear and determine the case as presented before it, and by its mandate direct the proper decree to be entered in the District Court.

VII.

WE CONTEND THAT THE COURT ERRED IN HOLDING THAT THE RATE OF INTEREST ON JUDGMENTS IN MICHIGAN IS SEVEN PER CENT. PER ANNUM.

The mandate of the Supreme Court directs the District Court "to enter a decree in conformity with the opinion of this court, with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan."

Section 3 of Chapter 6 of the Revised Statutes of Michigan of 1838, is as follows:

> "The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time. Provided, that in cases of money loaned it shall be lawful for the parties to stipulate in writing for the payment of any interest not exceeding ten per cent. per annum."

Section 8 of the same chapter provides for interest on judgments, verdicts, etc., as follows:

> "Interest may be allowed and received upon all judgments at law for the recovery of any sums of money, and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made, and such interest may be collected on execution."

Section 8 was amended in 1855 (Session Laws 1855, page 31) by adding the following:

> "At the rate of seven per cent. per annum; Provided, That on a judgment rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum."

This section as amended is found in the compiled laws of 1857, Sec. 1317; Compiled Laws of 1871, Sec. 1635; Howell's Statutes, Sec. 1597, and Compiled Laws of 1897, Sec. 4865.

The legal rate of interest remained unchanged until 1887, when Sec. 3, above referred to, was amended, making the legal rate six per cent. per annum. Session Laws, 1887, page 153.

In 1891 the legislature passed an act entitled "An Act "to regulate the interest of money on account, interest on "money judgments, verdicts, etc.," as follows:

> "Section 1. The People of the State of Michigan Enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due."
>
> "Section 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."
>
> Compiled Laws of 1897, Sec. 4856.
>
> Session Laws of 1891, pp. 197-8.

The Legislature of 1898-9 amended Sec. 1 of the Act of 1891 by fixing the legal rate of interest at five per cent., and permitting parties to contract for a rate not exceeding seven per cent.

Public Acts of 1899, Act 207, page 324.

This act went into effect September 22, 1899, and the language is as follows:

"The People of the State of Michigan Enact:

"SECTION 1. That Section One of Act numbered one hundred and fifty-six of the Public Acts of eighteen hundred and ninety-one, entitled, 'An Act to regulate the interest of money on account, interest on money judgments, verdicts, etc.,' the same being compiler's section one thousand five hundred ninety-four of volume three of Howell's Annotated Statutes, and section four thousand eight hundred ninety-seven, be and the same is hereby amended to read as follows:

"SECTION 1. The People of the State of Michigan Enact: That the interest of money shall be at the rate of five dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding seven per cent. per annum; Provided, that this act shall not apply to existing contracts, whether the same be either due, not due, or part due."

It will be observed that in the first Act authorizing interest on judgments, verdicts, etc., the rate of interest which they should bear was not stated; in 1855 the Legislature fixed the rate at seven per cent., the then legal rate of interest.

It evidently never was intended that judgments, verdicts, or decrees should bear a higher rate of interest than the legal rate fixed by statute, except in cases where the instrument upon which suit is brought bears a higher rate for which parties might legally contract.

There can be no question but that the Act of 1891 contemplated the reduction of the rate of interest, not only on money due on account or contract, but upon judgments, verdicts, etc., as well.

The title of the act, viz.: "An act to regulate the interest

13450

"of money on account, *interest on money judgments, ver-*
"*dicts, etc.,*" fully expressed its object, and the body of the act providing that the interest of *money* should be at the rate of six per cent. per annum harmonizes with the title.

In *Ryerson* v. *Utley,* it is said: "Any provision of the "act directly or indirectly relating to the subject expressed "in the title, and having a natural connection therewith, "and not foreign thereto, should be embraced by it."

Ryerson v. *Utley,* 16 Mich., 278.

Under the constitution of Michigan the title of an act is significant, and usually controlling in determining its scope.

McKellar v. *Detroit,* 57 Mich., 158.

The body of the act must reasonably harmonize with the title.

Booth v. *Eddy,* 38 Mich., 245.
Bates v. *Nelson,* 49 Mich., 459, 462.
Northwestern Mfg. Co. v. *Judge,* 58 Mich., 381-3.
McKellar v. *Detroit,* 57 Mich., 158.

The construction of the statute contended for by the respondents, viz., that the Acts of 1891 and 1899 relate only to interest on contracts, and not to interest on judgments and decrees, is too narrow and technical to be seriously considered.

A statute should be construed reasonably and not in so narrow and technical a sense as unnecessarily to embarrass legislation.

Ryerson v. *Utley, supra.*

The title and the body of the act must be taken together, and the word *money* used in the body of the act must mean money due on judgments, verdicts, etc., as well as money on account.

Even without the clause contained in the Act of 1891, repealing all acts and parts of acts contravening the provisions of that act, that part of Section 4865, Compiled Laws, 1897, allowing seven per cent. interest on judgments, verdicts, etc., would be repealed by implication.

It is also contended by the appellees that Sec. 4865 is still in force because it is found in all the compilations from 1857 down to 1897, and counsel argues that two commissioners appointed to examine the general laws of the state have certified that the compilation of 1897 is a correct compilation of the laws, *in force* in the state, including the general laws and amendments passed at the session of 1897.

This argument is not sound. It is for the courts, and not for commissioners or compilers, to construe the laws of the state.

If Section 4865 is still in force, and judgments and decrees draw interest at seven per cent. per annum, the situation is a curious one, to say the least. Assume, for instance, that a note or contract specifies the now legal rate of interest (five per cent.); if such note or contract is put in judgment, the judgment will continue to draw five per cent., only, because of the clause in Section 4865 that if the judgment is rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum. If, however, the rate of interest is not specified in the instrument, the rate would be the legal rate, or five per cent., up to the time the judgment is obtained, and thereafter the judgment would draw interest at the rate of seven per cent.

We submit that Section 4865, fixing the rate of interest at seven per cent. on judgments and verdicts was repealed by the Act of 1891, and that under the amendment of 1889 appellees are entitled to but five per cent. interest on the amounts stipulated to be due them.

VIII.

WE CONTEND THAT INTEREST IN ADMIRALTY HAS NEVER BEEN ALLOWED AT A HIGHER RATE THAN SIX PER CENT. AND THAT THIS IS A UNIFORM RATE EXISTING IN ALL THE COURTS OF THE UNITED STATES SITTING IN ADMIRALTY WITHOUT REFERENCE TO THE LEGAL RATE PREVAILING IN DIFFERENT PLACES IN WHICH THE COURTS ARE LOCATED.

The allowance of interest in cases of admiralty rests entirely in the discretion of the court.

Hemmenway v. *Fisher,* 20 How., 255.
Dyar v. *National Steam Nav. Co.,* 118 U. S., 507.
The "North Star," 44 Fed. Rep., 497.

In the case of *The "Mary Eveline,"* 14 Blatch., 497, Fed. Case 9212, Mr. Justice Hunt says:

> "In allowing interest at the rate of seven per cent. for the damage sustained, as upon a total loss, I think the Commissioner erred. The rate in such cases is established in Admiralty at six per cent., and the exception under consideration is allowed unless the libelants shall, within ten days after the entry of the order in pursuance of this opinion, file their stipulations, deducting one-seventh of said interest, to wit, the sum of $212.05, from the decree to be entered in this case. If such stipulation be filed as above provided, the said tenth exception is overruled. This point is decided after a conference with Judge Blatchford, and with his concurrence and approval."

The "Mary J. Vaughan," Fed. Case 9217, 17 2nd, Ben., 47.
The "Aleppo," 7 Ben., 120.
Allen v. *McKay,* 1 Sprague, 219.

In the case of *The "Aleppo,"* Fed. Case 158, 347, Mr. Justice Blatchford said:

> "In admiralty, in cases of collision, where interest is allowed, it ought to be a uniform rate, and not one varying with the laws of the states. *Hemmenway* v. *Fisher,* 20 How., 255, 259. Such rate of interest in collision cases tried in this court has been and is six per cent., except that on money paid out here, for repairs made here, interest according to the law of this state has, in some cases, been allowed. This rate of six per cent. was fixed at an early day, in analogy, perhaps, to the rate fixed by act of Congress as the rate on bonds for duties to the United States. Act March 2, 1799, p. 65, 1 Stat., 677. It is the rate which the Supreme Court has allowed in cases of this kind."

From personal experience and observation it is the universal rule in the districts bordering on the Great Lakes that the rate of interest is six per cent., and nowhere is this better established than in the Eastern District of Michigan. In fact, the original decree in this case in the District Court was drawing six per cent. interest.

We think that in ordering the mandate the court lost sight of the fact that this was an admiralty case and therefore following the language used in cases at common law and chancery under the rule, inserted the words now found in the mandate and usually used in such cases.

The matter of interest being a matter of discretion the court should change the mandate.

Respectfully submitted.

C. E. KREMER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioners.

CHICAGO, September, 1902.

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JAMES H. McKENNEY,
Clerk

Br. of Canfield for Insurers, Respts.

Supreme Court of the United States

Filed May 13, 1901.

IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE STEAMER NEW YORK, FOR A WRIT OF CERTIORARI.

BRIEF IN BEHALF OF THE UNDERWRITERS ON THE CONEMAUGH'S CARGO, RESPONDENTS.

F. H. CANFIELD,
Counsel for Underwriters.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

Supreme Court of the United States

In the matter of the petition of the Union Steamboat Company, claimant of the steamer New York, for a writ of certiorari, directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of the Union Steamboat Company, claimant and appellant against the propeller Conemaugh et al., claimants and intervenors.

BRIEF IN BEHALF OF THE UNDERWRITERS ON THE CONEMAUGH'S CARGO.

In behalf of the underwriters on the Conemaugh's cargo we submit that this application should not be granted for the following reasons:

I.

It clearly appears from the record, and especially by the opinion of the Circuit Court of Appeals rendered on April 2, 1901, that the question involved is one which only affects this particular case and the parties thereto. It is not one of such grave and general importance as should appeal to the court, successfully, for the *discretionary* writ of *certiorari*.

The Mer. Const. Co. vs. Jacksonville Ry. Co., 148 U. S., 372, 383.
Lau Ow Bew, petitioner, 141 U. S., 583.

The case does not involve the general question whether, in cases of collision resulting from mutual fault, the owner of one of them can recoup from the other, or her owner, a moiety of what he may have to pay on account of the loss to the cargo damaged by such collision. The owners of the Conemaugh, having never been impleaded by a cross-libel, or by a petition under the 58th General Admiralty rule, or in any other way, *that* issue was never presented in the case.

The Beaconsfield, 158 U. S., 303.

The petitioner, in the court below, asked for what, in effect, was an affirmative decree against the owners of the Conemaugh (see ex parte The Union Steamboat Company, 178 U. S., 317-320), without having filed any pleading upon which a decree could be based.

The cross-libel referred to in the record was not against the owner of the Conemaugh *in personam*, but was a libel *in rem* against the Conemaugh. But no writ was issued under this cross-libel, and therefore the Conemaugh herself was never brought into the case.

Furthermore, the record shows that the District Court by its decree on May 16, 1895, dismissed the cross-libel. This was a final decree as to every claim which could be asserted under the cross-libel, if it ever had any vitality; and as the decree was never appealed from it must be regarded as *res judicata* as to the right of the petitioner to any affirmative relief in the case, under the rule laid down in *The Dove*, 91 *U. S.*, 381.

The Circuit Court of Appeals has decided that the decree for recoupment, asked for by the petitioner, should not be granted in this case, because there was nothing in the *pleadings* which justified such a decree, and that the petitioner must seek its remedy in some other proceeding. Thus, it appears that the question involved is merely one of *pleading* in a particular case, and not one of such general importance as ought to be removed to this court by *certiorari*.

Another reason why this petition should be denied is that as pointed out by the opinion of the Circuit Court of Appeals, Rec., 17, the petitioner may assert their claim for recoupment by an independent proceeding against the Conemaugh. The denial therefore, will result in no injustice to the petitioner.

II.

As respects the rights of the underwriters on the Conemaugh's cargo, including not only those who have intervened, but also those who are represented by the owner of the Conemaugh as trustee, the case is very clearly one in which the writ should not issue.

This court has already decided that the underwriters are entitled to recover in full their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. In its opinion, delivered by Mr. Justice Brown, in *The New York*, 175 *U. S.*, 187-209, it was said:

> "4. The final question arises upon the insistence of the underwriters of the Conemaugh's cargo, that

they are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision. They are correct in this contention. Indeed, this court has already so decided in the case of *The Atlas*, 93 U. S., 302, 315, 317. This was a libel against the Atlas by an insurer of the cargo of a canal boat in tow of the steam tug Kate, whereby the canal boat and her cargo were lost. It was insisted by the claimant that, as the libelant had failed to make the Kate a party, and as both vessels were found to be in fault for the collision, there could be a recovery of only a moiety of the damages. The case of *The Milan*, Lush., 388, was confidently relied upon as an authority. This court, however, was of opinion that a plaintiff, who has suffered a loss by the negligence of two parties, was at liberty, both at common law and in admiralty, to sue both wrongdoers or either one of them at his election, and 'it is equally clear that if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all or any one of them separately. * * * Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libelant, nor is it a question in this case whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act.' A like ruling was made in *The Juniata*, 93 U. S., 337, in which a libel was filed by the United States as owner of the cargo of a flatboat in tow of one of two vessels."

Under the mandate issued by this Court the District Court entered a decree giving to the underwriters a recovery of their entire damages against the New York, and that decree was approved by this court in ex parte The Union Steamboat Company, 178 U. S., 318. The right of the underwriters to a full recovery against the New York, having been directly and definitely decided and established by this court, is no longer open for controversy or debate; for the decisions referred to must be regarded as "the law of the case."

Thompson vs. Maxwell, 168 U. S., 451-456.
Egan vs. Hart, 165 U. S., 188.
Kreiger vs. Shelby Ry. Co., 125 U. S., 39.

The Lady Pike, 96 U. S., 461.
Roberts vs. Cooper, 20 How., 481.
The Nuestra Senora de Regla, 108 U. S., 101.
Loeb vs. Columbia, 179 U. S., 472.

We submit, therefore, that the cargo underwriters, being entirely innocent of fault in this case, and being entitled to payment in full for their damages, should not be hindered or delayed in the collection of what is due to them by the issue of the writ now prayed for, and that the writ should therefore be denied.

Should the court, however, conclude that the question of recoupment, as between the owners of the New York and the owners of the Conemaugh, is of sufficient importance to call for the writ of *certiorari*, then we submit that it should be so framed as not to affect the rights of the underwriters, or hinder them in the collection of their claims against the New York.

F. H. CANFIELD,
Counsel.
F. H. & G. L. CANFIELD,
Proctors for the Intervening Underwriters, and the Erie & Western Transportation Co., Trustee for Underwriters who have not intervened.

Dec. 97 13455

No. 674.

In the Supreme Court of the United States.

Brief of Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
MAY 20 1901
JAMES H. McKENNEY,
Clerk.

In the matter of the petition of THE UNION STEAMBOAT COMPANY, claimant of the STEAMER NEW YORK, for a writ of *certiorari* directed to the Circuit Court of Appeals for the Sixth Circuit, to bring before the Supreme Court the case of THE UNION STEAMBOAT COMPANY, claimant and appellant, against the PROPELLER CONEMAUGH, et al., claimants and intervenors.

May 20, 1901.

Brief for
Erie & Western Transportation Company.

We submit the petition does not present any question warranting an exercise of the supervisory jurisdiction of this court by writ of *certiorari*.

The cause has been in the courts since 1891. It was tried and re-argued in the District Court; it was heard on appeal; it was brought into this court, and every question involved determined and a decree directed, November 20, 1899.

The New York, 175 U. S., 187.

A decree was entered pursuant to the mandate. Petition for writ of mandamus was then filed by the present petitioner, and on hearing was dismissed. The Court held the decree entered did not violate the mandate; that the question presented was an "entirely new question" to the case.

Ex parte, The Union Steamboat Co., 178 U. S., 317.

The case was again appealed to the United States Circuit Court of Appeals for the Sixth Circuit. That court held that the question of recoupment was not involved in the case presented, and petitioner's application for leave to amend, and, if possible at that stage of the case, to bring the question of recoupment into the litigation, was refused.

The cause stands as it did when the decree complained of was brought before the court and held not in violation of the mandate. In other words, the only question would be one special to this particular case and relating to amendment of pleadings ; a discretionary matter at best.

Where a district judge refused a respondent leave to amend his answer by setting up a plea of laches and of *res judicata* in respect of an allegation made for the first time in a third amended libel, and the affidavit filed in support stated, as a reason for not earlier setting forth the defenses in question, that counsel "was then of opinion that his client was entitled to judgment on the defense then set up," this Court said that even if the respondent would have been entitled to the relief if reasonable diligence had been exercised and respondent's recourse was now lost by reason of the statute of limitations, still he knew of the claim against him, he was not misled by any act of the other party, and it was not an abuse of discretion to deny leave to amend.

O'Brien vs. Miller, 168 U. S., 287-309.

The Union Steamboat Company knew from the beginning of this litigation that the cargo interests were proceeding against the New York alone. If the petitioner and counsel entertained and acted upon the judgment that petitioner was entitled to the relief without claiming it, it was their own deliberate judgment. It does not appear that petitioner will lose any right if the question is not determined in the present litigation. No

special equity can be urged in petitioner's behalf; indeed, the equities call for the termination of this litigation.

Moreover, the propeller Conemaugh (owned by the Erie & Western Transportation Company) was never brought into the case at all.

The litigation has now extended over a period of ten years; the questions involved were determined by this court in November, 1899. To bring in new matter now and make new issues would continue the litigation for a further indefinite time.

If either party has, as against the other, undetermined rights, they should be asserted in an independent proceeding.

We submit the petition should be dismissed.

HARVEY D. GOULDER,
Proctor for Erie & Western
Transportation Company.

No. 94.

Brf. of Canfield for Underwriters

13457

Office Supreme Court U.S.
FILED
OCT 10 1902
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 10, 1902.

THE UNION STEAMBOAT COMPANY,
Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY, *Owner of the Propeller Conemaugh, and the Underwriters on the Conemaugh's Cargo.*

No. 97.
October Term,
1902.

BRIEF FOR UNDERWRITERS who originally intervened in the District Court.

F. H. CANFIELD,
Proctor for Underwriters.

POTTER PRINTING CO., DETROIT, MICH.

13458

SUPREME COURT OF THE UNITED STATES.

THE UNION STEAMBOAT COMPANY,
Claimant of the Propeller New York,

vs.

THE ERIE & WESTERN TRANSPORTATION COMPANY, *Owner of the Propeller Conemaugh, and the Underwriters on the Conemaugh's Cargo.*

No. 97.
October Term,
1902.

BRIEF FOR UNDERWRITERS who originally intervened in District Court.

In behalf of said underwriters on the cargo of the Conemaugh, I desire to call the attention of the Court to the final decree of the District Court originally entered in the cause, which is appended to this brief. It will appear from the decree that the aggregate damages awarded to the owners of the Conemaugh and the cargo underwriters was $58,315.58, which included $25,424.55 incurred as salvage expenses in raising and rescuing the Conemaugh and her cargo, and that the Court reserved the apportionment of said sum, $25,424.55, for further consideration. This is shown by the last paragraph of the decree, which reads as follows:

> "And it appearing to the Court that the salvage expenses incurred in raising and rescuing said

steamer Conemaugh and her cargo, included in the aforesaid item of $25,424.55, were contributed to by the several parties interested in said steamer and her cargo, including the intervenors aforesaid, and that they are entitled to share in the amount recovered by this decree on account of said item as between themselves on the principles of general average; it is therefore further ordered that the apportionment of said sum of $25,424.55 and the interest thereon, between the said libellant as owner of said steamer and the said intervenors and others interested in said cargo, be reserved for the future determination of the court after the damages and interest awarded by this decree are paid into the registry of this court, or until the further order of the court."

It will be seen that this is a matter between the owners of the Conemaugh and the underwriters. It does not concern the owners of the New York.

What we ask is that this court in determining the case will remit it to the District Court with instructions to make the proper apportionment of these salvage expenses, to the end that all the underwriters, including the intervenors as well as those represented by the Conemaugh as trustee, may receive their due and proper shares.

Undoubtedly it is the rule in cases of collision, resulting from mutual fault of both vessels that the damages as between those vessels, or their owners, are to be equally divided. But it is also well established that the owners and underwriters on the cargo injured by the collision are entitled to recover their full damages against either of the vessels in fault. They may proceed in their own names against either or both. In this case they proceeded against the New York alone as they were entitled to do. Some of the underwriters proceeded in their own names as intervenors in the suit, some were represented by the owner of the Conemaugh as trustee. But whether they inter-

vened in their own names or were represented by the Conemaugh as trustee, all of the underwriters are entitled to recover their *full* damages from the New York. This right of full recovery against the New York of all the damages suffered by the cargo is not limited to the underwriters who intervened in their own names, but extends as well to the underwriters who are represented by the Erie & Western Transportation Company as trustee. This necessarily results from the opinion of this Court in *The New York*, 175 U. S., 187, and in *Ex Parte Union Steamboat Company*, 178 U. S., 317.

Whenever one of the vessels is proceeded against for the damages done to the cargo, and her owners are compelled to pay on account of the cargo, a sum, which, together with her own damages exceeds one-half of the entire damage resulting from the collision, the only way of working out the equal division of the entire loss is by allowing her owners to *recoup* from the other offending vessel, or her owners, the sum necessary to equalize the loss. It is quite evident that this cannot be done without the filing of the necessary libel, or cross-libel, or pleading of some kind, claiming the right to recoup, as basis for such a decree.

This equal division of damages as between the two intervening vessels cannot be arrived at, at the expense of the cargo owners, for they are to be paid in full by the owner of the vessel against which they have proceeded.

I.

The real gist of the complaint now made by the owners of the New York is the refusal of the Courts below to enter the decree proposed by them, and which is set forth on page 7 of their Counsel's brief, which decree is objectionable upon sev-

eral grounds: one of which is that while it may equalize the damages as between the two vessels, it does "so at the expense of the underwriters on the cargo of the Conemaugh." This is clearly shown by the opinion of the Circuit Court of Appeals (Rec., 46-47).

Such a decree would defeat the right of these underwriters "to a recovery of the full amount of their damages against the New York," which was expressly sustained by this Court in the case above cited.

The proposed decree is not in accordance with the mandate of this Court, set forth at page 22 of the record.

The decree proposed by the petitioner, although not so in form, is, in effect, an affirmative decree in its favor. This is recognized by this court in 178 U. S., at page 320, where it is expressly said that:

> "The equal division applied only to the vessels, and on the other hand, if the petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor,"

which ought not to be allowed without some pleading upon which to base it.

The general proposition of counsel for the petitioner, on page 21 of their brief, is to the effect that the court may, in all cases of collision resulting from the mutual fault of two vessels, allow a decree of recoupment in favor of the owner of the vessel proceeded against where such a decree is necessary to equalize the loss, without such relief being askked for in any pleading filed in the cause, is not only without precedent to support it, but it is unsound in principle and ought not to be sustained.

Suppose the ships A and B collide and the owners of

A libel B, and the owners of the cargo of A file intervening libels against B; and it is found that both ships were in fault; that A and B were each damaged to the amount of $10,000, and the cargo of A to the amount of $20,000, and its owners were awarded a decree against B which her owners pay. To effect a divsion "of all the damages equally," an affirmative decree would have to be awarded to the owners of B against the owners of A for the sum of $10,000. Is there any precedent or authority, or any principle, which would justify the court in making such a decree, unless it be asked for by some pleading in the cause?

Again, suppose in such a case the cargo of the B to be damaged to the amount of $20,000. Its owners intervene in a suit commenced by the owners of A and recover a decree against B: Could they recover $10,000, the sum necessary to equalize the loss against A, or her owners, without any pleading asking for such a recovery?

Suppose in the case at bar the damages suffered by the New York exceeded the damages suffered by the Conemaugh: To equalize the entire damage the New York would be entitled to recover one-half of the sum paid by her as damages to the owners of the Conemaugh's cargo. Such a decree in her favor would necessarily be an affirmative decree, which, without some pleading to base it upon, should not be granted unless all the rules of practice and pleading heretofore recognized by the courts are now to be treated as abolished.

Again, suppose in this case, the New York's cargo had been damaged, and its owners had intervened in the cause against her, and both vessels being found in fault, the cargo owners had been awarded their full damages against the New York. Is there any doubt that the equalization of the damages between the two steamers could not be worked out in the absence of some proper pleading for that purpose?

It is not enough that "all the parties are before the Court." They must be there in the proper capacity. They must be properly impleaded to authorize a decree in favor of the one and against the other.

The Enterprise, 2 Curtis, 319;
The Zodiac, 5 Fed., 220-224;
The Sabine, 101 U. S., 384.

The fact that some of the underwriters are represented by the owners of the Conemaugh as trustee does not affect the case. The right to a full recovery of their entire loss is the same whether they appear by their trustee or in their own names. A party suing in his own right, and as trustee, appears in two distinct capacities. Whatever rights the owners of the cargo could enforce against the New York, if they intervened in their own names, may be enforced in the name of the owner of the Conemaugh as trustee. Therefore the underwriters who are represented by the Erie & Western Transportation Co., owner of the Conemaugh, as trustee, are entitled equally with those who intervened in their own names to recover their full damages against the New York.

The Beaconsfield, 158 U. S., 303-309.

If the petitioners had filed a *proper cross libel,* or, perhaps, if it had appealed from the decree of the District Court which dismissed the cross libel which it filed, the case might be different. (*The Dove,* 91 U. S., 981.) So, also, if it had proceeded against the owners of the Conemaugh under the 59th General Admiralty Rule, a different case would be presented.

The Beaconsfield, 158 U. S., 303.

The petitioner, it is true, was not obliged to do either. It might have instituted another original suit. It still has this remedy. But as was said in the *Juniata,* 93 U. S., 337, it cannot enforce its supposed rights in *this* litigation. Nor can it do so in any litigation *"at the expense of the underwriters."*

AS TO THE RATE OF INTEREST.

Petitioner's Counsel contend that interest should have been allowed at the rate of 6 per cent. (brief, p. 6); in the decree which they ask to have entered (brief, 5), 5 per cent. is the rate named.

This court, by its mandate, directed the district court to enter a decree, with interest from July 3, 1896, until paid, at the rate per annum that *decrees* bear in the courts of the State of Michigan. (23.)

The rate of interest which decrees bear in the State of Michigan is expressly provided for by Section 4865 of the Compiled Laws of Michigan of 1897, which reads as follows:

> (4865). Sec. 6. "Interest may be allowed and recovered upon all judgments at law, for the recovery of any sums of money, and upon all *decrees* in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of *seven* per centum per annum; Provided, That on a judgment rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per centum."

This is the only statute in Michigan which, in terms, provides for interest on judgments and decrees. It has been embodied in, and has formed a part of the laws of the state since 1838 to the present time; and always as a distinct and independent section, in substantially the same form. It appears in the Revised Statutes of 1846 and in the various compilations of the laws of the state "in force," made under legislative authority

in 1857, 1871 and 1882, and, finally, in the last compilation of 1897, made six years after the Act of 1891, upon which petitioner's counsel base their argument was adopted.

See:

How. Ann. Stat., Sec. 1597;
Comp. Laws of 1857, Sec. 1317;
Comp. Laws of 1871, Sec. 1635.

The statute quoted is plain and unambiguous. But counsel for the appellant claims that notwithstanding it appears in the compilations of the law "in force" in 1897, it was *repealed* by virtue of the Act of 1891.

Session Laws of 1891, page 197;
Comp. Laws of 197, page 1533.

I insist that Sec. 4865 remains "in force," and is not affected by the Act of 1891, or the amendment thereto of 1899. I base my argument upon the well settled rules of construction applicable in such cases; the decisions of the Supreme Court of the State; and the practical construction which the statute has received.

The Act of 1891 relates only to interest on *contracts*, and not to interest on judgments and decrees. It reads as follows:

> "An Act to regulate the interest of money on account, interest on money, judgments, verdicts, etc.
>
> "Section 1. *The People of the State of Michigan enact*, That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent. per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be due, not due, or part due.
>
> "Sec. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of in-

terest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon.

"Sec. 3. Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void.

"Sec. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

(It is unnecessary to refer to the amendment adopted in 1899, except to say that it simply changed the rate from 6 to 5 per cent. *Public Acts of* 1899, p. 324.)

This statute of 1891 simply relates to the rate of interest on *contracts*. It does not include *judgments or decrees*.

The statute relating to interest on contracts as it existed prior to 1891, is to be found in 1 *How. Ann. Stats.,* Sections (1594) and (1595).

A comparison of said section 1594 with section 1 of the Act of 1891, it will be found that aside from the proviso contained in said section 1, that the two are identical, except that the word *seven* in section 1594 has been changed to *six*.

Sec. (1595), like Sec. 2 of the Act of 1891, relates only to the effect of usury and the penalty therefor.

Plainly Secs. (1594) and (1595) relate to interest on contracts, express or implied, while interest on judgments, verdicts and decrees are provided for by Sec. (1597) (How. Stats.), which has become Section 4865, of the present Comp. Laws of the State of 1897.

By the common law judgments and decrees do not bear interest.

Freeman on Judgments, Sec. 441;
Black on Judgments, Sec. 381;
Washington, etc., Co. vs. Harmon, 147 U. S., 571.

It will be presumed that the Legislature knew this, and was therefore careful to provide, expressly, by a special section of the statute, above quoted, that judgments and decrees in the State of Michigan should bear interest at a rate specified therein. This was done as early as 1838. (Rev. Stats. of 1838, page 161.) And this special section has been retained in every revision and compilation of the laws of the State since 1838, including the revision of 1846 and the compilations of 1857, 1871 and 1882, as well as the compilation of 1897, which was made six years after the Act of 1891 was adopted.

It will be observed that Sec. 1 of the Act of 1891 (with the exception of the proviso), is identically the same as Sec. 3 of the Rev. Stats. of 1838, being Sec. 3, Chapt. 34 of the Rev. Stats. of 1846 (How. Stats., Sec. 1594), except as to the *rate* of interest.

If Sec. 1 of the Act of 1891 is broad enough to include interest on judgments and decrees, Sec. 3 of the old law (How. Stat., Sec. 1594) is also broad enough for that purpose. But if this is true of the old law, why was the Legislature when it adopted that law, careful to include a special section, which, in express terms, provides for interest on judgment and decrees? Why has it preserved this distinct and separate section for more than sixty years, through all the subsequent revisions and compilations of the statutes, if it was not necessary in order that judgments and decrees should bear interest?

An examination of these several statutes leads, irresistibly, to the conclusion that Sec. 1 of the Act of 1891 was intended merely as a substitute for Sec. 1594 (How. Stats.), and that the purpose of the Legislature was simply to reduce the rate of

interest on *contracts* from seven to six per cent., leaving the rate of interest on judgments and decrees to be governed by Sec. (4865), of the Laws of 1897, which we have already quoted.

The Act of 1891 does not expressly repeal Sec. 4865, which provides for interest on judgments and decrees. It only repeals such acts and parts of acts as *contravene* its provisions. Sec. 4865 does not contravene the provisions of the Act of 1891. The former relates to interest on judgments and decrees, while the latter only relates to interest on *contracts, express or implied.*

Repeals by implication are not favored; the rule being that there must be a *positive repugnancy* between the provisions of the new statute and those of the old in order to work a repeal by implication.

In *Rosecrans vs. U. S.*, 165 U. S., 257, it is said:

> "Where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation, equally express and is not overthrown by mere inferences or implications to be found in such subsequent legislation."

This is peculiarly applicable to the present case. The Legislature has expressly legislated in respect to interest on judgments and decrees; and the subsequent legislation of 1891 does not, in express terms, refer to *such* interest. Therefore the former legislation cannot be considered as having been repealed.

This is a general rule of construction, and has been followed by the Supreme Court of Michigan in many cases.

People vs. Hanrahan, 75 Mich., 622;

Rice vs. Hosking, 105 Mich., 303-306;
Brown vs. McCormick, 28 Mich., 215;
Conners vs. Iron Co., 54 Mich., 168;
Canal & R. Co. vs. Attorney General, 79 Mich., 353.

See particularly, *University Regents vs. Auditor General,* 109 Mich., 134, which involved the construction of the statutes relating to interest.

Also:

Wood vs. United States, 16 Peters, 342;
Chew Heong vs. U. S., 112 U. S., 549;
Frost vs. Wenie, 157 U. S., 46.

There is no inconsistency or conflict between a statute which, in terms, provides for interest on judgments or decrees, and one which fixes the rate of interest in matters of contract and prescribed a penalty for usury. The two may well exist together in perfect harmony. Therefore the Act of 1891 did not repeal the prior statute providing for interest on judgments and decrees.

Henderson's Tobacco, 11 Wall., 652;
United States vs. Tymen, 11 Wall., 92;
State vs. Stoll, 17 Wall., 431.

As to the effect which should be given to the title of the Act of 1891. It reads, literally, as follows:

> "An Act to regulate the interest of money on account, interest on money, judgments, verdicts, etc."

It will be noted that the title does not contain the word "decrees," which is contained in Sec. 4865 (already quoted), which declares that

> "Interest may be allowed and received upon all judgments at law, for the recovery of any sums of

> money and upon all *decrees* in chancery for the payment of any sums of money."

There is a distinction between judgments and decrees. They are not synonymous. By judgments, we mean the final sentence of a court of common law; and by decrees, we mean the final order or sentence of a court of equity, or some other court proceeding according to the course of a court of equity. This distinction has been recognized by this Court.

Thus, by the Act of 1842, U. S. Rev. Stats., 966, it is provided that:

> "Interest shall be allowed on all *judgments* in civil causes, recovered in a Circuit or District Court."

And it has been held that this did not embrace *decrees* in equity, but is confined to judgments at law.

Perkins vs. Fourniquet, 14 How., 328, 331;
Hagerman vs. Moran, 75 Fed., 97.

If the Act is read without the title, no one would suppose that it was intended to include either judgments, or decrees in chancery. The title of an act furnishes but little aid in its construction. It cannot extend its effect or meaning beyond the scope of the text or body of the act itself.

Hadden vs. Collector, 5 Wall., 107;
U. S. vs. Church, etc., 36 Fed., 304;
Wilson vs. Spaulding, 19 Fed., 304;
U. S. vs. Palmer, 3 Wheat., 610;
Northern Pacific R. Co. vs. Barden, 46 Fed., 592;
Goodlett vs. Louisville R. Co., 122 U. S., 391.

There are various sections of the Compiled Laws of Michigan relating to interest which are distinct from the gen-

eral provisions of the Act of 1891, as to interest upon contracts, and which were *in force* long before the Act of 1891 was adopted. Thus, in addition to section 4865, relating to interest on judgments and decrees, there is section 1195 (How. Stat., 5361), which provides for interest on certain educational funds of the State; also section 1196 (How. Stat., 5360), providing for interest on the University fund, and which the Supreme Court, in *University Regents vs. Auditor General,* 109 Mich., 134, expressly decided has not been affected by the Act of 1891. There is also section 10,470 (How. Stat., 8139), respecting interest on judgments rendered against incorporated banks, which provides that the plaintiff in such judgments shall recover "ten per cent. a year" instead of the rate established by law; and Sec. 3912, which provides that money due for delinquent taxes shall, after a certain date, bear interest at the rate of eight per cent. All of these statutes relate to *interest on money,* and if the appellant's argument is sound all of these statutes have been repealed or amended by the Act of 1891. All of these statutes contravene the Act of 1891, quite as much as does section 4865, relating to interest on judgments and decrees.

The decisions of the Supreme Court of the State regard Section 4865 as being still in force.

Hayden vs. Hefferan, 99 Mich., 262, decided in 1894, three years after the Act of 1891 was adopted, involved the question whether a judgment for costs in favor of an appellant in an appeal from the Probate Court would bear interest. The Court said:

> "A judgment for costs is as much a judgment as any other, and is therefore within the terms of the statute. * * * Interest upon claims allowed against the estates of deceased persons may be claimed under Section 1597, How. Stat. [Sec. 4865, Comp. Laws of 1897], is broad enough to cover the present case."

In *F. & P. M. R. Co. vs. Board of State Auditors,* 102 Mich., 500, the Court said that:

> "as between individuals it was settled in *Hayden vs. Hefferan,* that the prevailing party is entitled to interest upon the costs from the date of the judgment or decree; and that the State is subject to precisely the same liability for costs and for the incidents of the judgment as an individual would be, with the single exception as to the method of collecting the demand."

Both of these cases recognize Sec. 4865 as being still in force and they afford a satisfactory answer for the argument that that section was repealed by the Act of 1891.

If the Legislature intended that the Act of 1891 should include judgments and decrees it could easily have said so, and would doubtless have used apt words to express its meaning.

The final proposition of petitioner's counsel, on page 49 of their brief, that there is a uniform rule in the Admiralty Courts which allows interest at the rate of six per cent., irrespective of the rate allowed by the local law of the State where the cause is tried, seems quite inconsistent with the rest of their argument, and with their proposed decree, in which they specify the rate of interest at five per cent. Why should they ask the court to allow them five per cent. in this case if there is a general rule of the Admiralty which allows six per cent.?

It is true that the allowance of interest in Admiralty causes, as a general rule, rests in the discretion of the Court. And in the exercise of this discretion, the Court may fix the *rate* of interest. This Court, in the exercise of its discretion, has allowed interest in this case *"at the same rate per annum that decrees bear in the Courts of the State of Michigan."* Such is the language of its decree and mandate, *and this is the law of*

this case. The term during which that decree was entered is long since past and it cannot now be modified.

I submit that the decree of the Court below should be affirmed.

F. H. CANFIELD,
Proctor for Underwriters who
originally intervened in District
Court.

ORIGINAL DECREE OF DISTRICT COURT.

Afterwards, at a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room in the City of Detroit, in said District, on Friday, the third day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Hon. Henry H. Swan, District Judge

THE ERIE AND WESTERN TRANSPORTATION COMPANY,
Libellant,
vs
THE PROPELLER "NEW YORK," *her engines, etc.;*
The Union Steamboat Company,
Claimant and Respondent.

On Libel for Damages for Collision. In Admiralty.

On reading and filing the report of D. J. Davison, the Commissioner to whom it was referred to ascertain and report the damages resulting from the collision in this cause, which report was filed on the 18th day of June, 1896, by which there is reported due to the Libellant in its own behalf as owner and as trustee for the underwriters on the propeller Conemaugh, the sum of twenty-five thousand four hundred and twenty-four and 55/100 dollars ($25,424.55), including the cost of raising and repairing said propeller, together with the expenses incurred in and about the rescuing and caring for the cargo of said steamer; and that there is also due to said Libellant, as trustee for the owners of and the underwriters on the cargo of said steamer, the further sum of thirty-two thousand eight hundred and ninety-one and 3/100 dollars ($32,891.03), exclusive of expenses incurred in and about the raising and saving of the said cargo, making the aggregate damages due to the said Libellant in its own behalf and as trustee as aforesaid, the sum of ($58,315.58); and on reading and filing the exceptions to said report, and after hearing the arguments of Counsel, and the same having been duly considered, and it appearing to the Court that interest is equitably allowable on the amount of said damages for the period of three years and four

months, it is therefore ordered, adjudged and decreed that said report be, and the same is hereby modified so as to allow interest at the rate and for the time aforesaid, and that said report be in all other respects, ratified and confirmed as between the libellant and the claimant in said cause, and its surety on the bond or stipulation filed herein.

And it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company in its own behalf and as trustee for the underwriters on said steamer Conemaugh, and as trustee for the parties interested in the cargo of said steamer, as owners or underwriters thereof, recover of the said Union Steamboat Company, claimant in this cause, the sum of sixty-nine thousand nine hundred and seventy-eight and 9/100 dollars ($69,978.91), being the amount of the damages aforesaid, together with interest thereon at the rate of six per cent. per annum, for the period of three years and four months, and that the said libellant also recover its costs of suit to be taxed. And it further appearing that the said Propeller New York was duly proceeded against *in rem* in this cause, and that she was thereafter duly bonded by the Union Steamboat Company, a corporation, as Claimant and owner thereof, and the American Surety Company, of the City of New York, a corporation, as surety, by their bond or stipulation, in the sum of seventy thousand dollars, conditioned to abide the decree of this Court in this cause, on motion of John C. Shaw, proctor for the libellant, and F. H. & Geo. L. Canfield, proctors for the intervenors in said cause, it is further ordered, adjudged and decreed that judgment be, and the same is hereby entered against the said Union Steamboat Company, claimant, and the said American Surety Company of the City of New York, as surety, as aforesaid, for the aforesaid sum of $69,978.91, with interest from the date of this decree, and the costs of suit to be taxed.

And it is further ordered, that unless said damages, interest and costs be paid into the registry of this Court, within ten days from this date that execution be issued against the said claimant and surety in due form therefor.

And it further appearing that the British and Foreign Marine Insurance Company, Limited, the Union Marine Insurance Company, Limited, the Marine Insurance Company, Limited, and the Insurance Company of North America, were insurers on portions of the cargo of the said steamer Conemaugh, which were lost or damaged by reason of the said collision, and that the same was duly abandoned to them by the owners there-

of, and that they have intervened in this cause for the protection of their respective interests; and it also appearing to the Court from the report of said Commissioner that the damages resulting from said collision to said several insurers of said cargo, who have intervened as aforesaid, exclusive of expenses incurred by them in and about the salving and handling of the cargo, but including interest, is as follows, to-wit: To the British and Foreign Marine Insurance Company, Limited, the sum of two thousand one hundred fifty-eight and 75/100 dollars ($2,158.75).

To the said Union Marine Insurance Company, Limited, the sum of seven thousand four hundred and eighty-three and 20/100 dollars ($7,483.20).

To the said Marine Insurance Company, Limited, the sum of eight hundred twenty-two and 49/100 dollars ($822.49); and to the said Insurance Company of North America the sum of six thousand six hundred seventy-nine and 23/100 dollars ($6,679.23).

It is therefore ordered and decreed that out of the aforesaid sum of $69,978.91 there be apportioned and paid to the said British and Foreign Marine Insurance Company, Limited, the said sum of $2,158.75, with interest from the date of this decree.

To the said Union Marine Insurance Company, Limited, the said sum of $7,483.20, with like interest.

To the said Marine Insurance Company, Limited, the said sum of $822.49, with like interest; and to the said Insurance Company of North America the said sum of $6,679.23, with like interest.

And it appearing to the Court that the salvage expenses incurred in raising and rescuing said steamer Conemaugh and her cargo, included in the aforesaid item of $25,424.55, were contributed to by the several parties interested in said steamer and her cargo, including the intervenors aforesaid, and that they are entitled to share in the amount recovered by this decree on account of said item as between themselves on the principles of general average; it is therefore further ordered that the apportionment of said sum of $25,424.55 and the interest thereon, between the said libellant as owner of said steamer and the said intervenors and others interested in said cargo, be reserved for the future determination of the Court after the damages and interest awarded by this decree are paid into the registry of this Court, or until the further order of the Court.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 97.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE PROPELLER NEW YORK,

Petitioner,

VS.

THE ERIE & WESTERN TRANSPORTATION COMPANY, ET AL.

BRIEF FOR THE ERIE & WESTERN TRANSPORTATION COMPANY.

Brief for petitioner gives the history of the litigation, except that to the statement (p. 2) that no answer was filed to the cross-libel there should be added the following by the District Judge, (in answer to the alternative writ, 178 U. S. 317,)

> "No process was issued nor was the court asked to "enter any order requiring the said Erie & Western "Transportation Company to give security for the "claim set up in said cross-libel under general admir- "alty rule 53, nor does it appear that any copy of said "cross-libel was ever served or any proceeding what- "ever had under the same,"

and from the dismissal of the abandoned cross-libel, no appeal was taken, leaving the case in this respect as if that paper had never been filed.

The Dove, 93 U. S., 581.

Also (p. 4) occurs the statement of a conclusion that this court in its former consideration of this case (178 U. S. 317) "held" that petitioners remedy was by appeal and not by mandamus. The decision rendered was that the petition for mandamus must be dismissed as there was no disobedience of or departure from the mandate (178 U. S. 320).

The court said definitely

"no question of recouping one-half of such damages "to the cargo from the moiety of damages awarded "the Conemaugh was made by counsel or passed upon "by this court. * * * It is an entirely "new question, quite unaffected by the case of the New "York."

The decision of the Circuit Court of Appeals, of which complaint is now made, shows that the question of recoupment was not afterwards introduced.

CONTENTIONS OF PETITIONER.

The record discloses no assignment of errors, nor anything upon which to predicate argument, unless it be the question of *per centum* of interest, which is fully argued in brief of counsel for cargo. It is, therefore, significant, and should be controlling, that the argument presented on the question of recoupment is predicated solely upon the contentions put forward in the brief itself.

In other words, the matter of "recoupment," with the brief alone as its vehicle, again comes as a new and academic question, since by the holdings of the District Court, the Circuit Court of Appeals and of this court, it has never been presented as a question in this case.

We dispute the contentions of petitioner on the grounds:

1. If the right of recoupment were self-operative, inherent in the law without assertion of the right or any basis in pleading or issue, then the question must always have been in and inseparable from the case. The court (175 U. S., 187), decided against it; final decree in form sanctioned by this court (178 U. S., 317), was entered; a full term has since intervened and the question cannot be re-opened in this case.

2. If it was a new question open to consideration in the District Court, subsequent to the decision and mandate of this court, then there is nothing for review, because no pretense is made of thereafter presenting the question in the District Court by any proceeding or action of any character soever. There was a bare formal appeal from the decree entered without any intervening act.

When the question how to dispose of the claim for cargo damage came directly before this court (175 U. S., 209-210), it was held that while the damage to the steamers should be divided, the cargo interests must have a full decree against the New York alone as being alone impleaded for that damage, relegating the New York, as in the cited case of the Juniata, 93 U. S., 337, to an independent proceeding for contribution.

The case went back to the District Court not "for further proceedings in conformity with the opinion," as in the *Schooner Catherine v. Dickinson*, 17 How., 170-178, or "to adjust the loss on the principles stated in the opinion," as in the *James Gray*, 21 How., 184-185, but, in the language of the mandate, to *enter a decree* in conformity with the opinion of this court, and for execution "*in conformity with the opinion and decree of this court* (Rec. 23). The District Court thereupon proposed to enter decree dividing the damages of the steamers and against the New York alone for the cargo loss. Petitioner then came before this court for mandamus, contending precisely as it does now, that there is some magic in the doctrine of recoupment or counter-claim which makes it self-operative and binds every court to regard and enforce it as matter of law, irrespective of pleading or issue, notwithstanding the recognized election which the party has to claim it in the principal case or to prosecute an independent proceeding. This was distinctly denied by this court in refusing the peremptory writ, the court saying (178 U. S., 320):

> "It may be true that the decree holds the New "York liable for seventy-six per cent of the entire "damages and not fifty per cent, but this results from "the fact that she was primarily held for the entire "value of the cargo. The equal division applied only "to the vessels, and upon the other hand if petitioner "be entitled to the recoupment claimed, it would, "apparently, result in an affirmative decree in its favor. "But no question of recouping one-half of such dam- "ages to the cargo from the moiety of damages awarded "the Conemaugh was made by counsel or passed upon "by this court."

This would seem to dispose of the contention up to that time, and as a full term has elapsed since the mandate was executed and the decree, entered with the sanction of this court, became operative, there would seem to be an end of this case unless some fresh action, permissible in law and effective to bring in this new question, has supervened.

The only suggestion about recoupment now or ever made was through the form of decree presented by petitioner to the District Court as conforming to the requirements of the mandate. To enforce the entry of that decree the mandamus proceeding was instituted, and that and everything involved therein this court necessarily passed upon in the 178 U. S., 317, saying (p. 320),

> " if petitioner be entitled to the recoupment claimed, " it would, apparently, result in an affirmative decree in " its favor."

It is true that in dismissing the petition, the court said (178 U. S. 319):

> " The inferior court is justified in considering and
> " deciding any question left open by the mandate and
> " opinion of this court, and its decision upon such mat-
> " ter can only be reviewed upon a new appeal to the
> " proper court."

The only question upon which the District Court could exercise judgment or had right of decision in respect of the decree to be entered, was the *per centum* of interest.

But as to entering decree against the New York alone for the entire cargo damage, notwithstanding the fault of the Conemaugh, leaving the New York to whatever right of independent action for contribution she had, this court determined that, and never thereafter was any question on the subject presented to the District Court for action.

What the petitioner did after the decree was entered and approved was purely and simply and without any intervening act, matter or thing on its part, to take bare formal appeal from the action of the District Court in entering the decree, thereupon assigning as error that the District Court decreed against the New York for the full amount of cargo damage, instead of entering the suggested form of decree which had been brought before this court in the mandamus proceeding and rejected and characterized as one which would apparently result in an affirmative decree in favor of the New York, upon a subject matter which was entirely new to the case.

It will be convenient to reproduce here the salient portion of the opinion of the Circuit Court of Appeals (Rec. 46.) After quoting what this court said about the right of the inferior court to consider questions left open by the mandate, the Circuit Court of Appeals said:

> " For appellants it is contended that the question of
> " recoupment could not come on for decision until it was
> " determined that both vessels were at fault and until the cargo
> " owners and underwriters had recovered their full damages
> " from appellant, and that the District Court had, therefore,
> " when entering a decree under the mandate, the right to con-
> " sider and decide whether or not appellant had then the right
> " to recoup one half of the cargo damages it was thereby con-
> " demned to pay from the moiety of damages awarded the
> " Conemaugh; and that any error committed by the District
> " Court in denying or granting such recoupment may be
> " reviewed here. To this view of the abstract question we
> " are disposed to assent. But when and how was this matter
> " of recoupment presented to the District Court? The decree
> " which the court did enter was in precise conformity to the
> " mandate of the Supreme Court. The cargo underwriters

"having proceeded only against the New York, were entitled "to recover their full damages against it as the only vessel "impleaded.

"If the New York had availed itself of admiralty rule 59, "as was done in the case of *The Beaconsfield*, 158 U. S., 303, "307, and brought in the Comemaugh as a vessel in fault "which also ought to be proceeded against for cargo losses, "the question of the liability of that vessel to cargo under- "writers would have been presented and the cargo damages "would have been divided, if it had been found that that "vessel was also in fault for the collision and had no valid "special stipulations in her bills of lading relieving her from "liability to cargo underwriters.

"But this course was not taken. By neither cross-bill, "petition nor answer was this question of the Conemaugh's l "iability to cargo underwriters presented. Nor does it appear "that the question of recoupment, now raised by an assign- "ment of error upon the decree of the District Court, was "ever presented to that court by any form of pleading. "Since this case was heard, the appellant has applied for "leave to supplement the record by adding to it a decree "which they prepared and submitted to the District Court "as a decree in compliance with the mandate of the Supreme "Court, whereby the entire losses were equally divided between "the vessels. That proposed decree is the decree which the "Supreme Court refused to compel the District Court to "enter when appellant applied to it for a writ of mandamus. "In substance the insistence of the Union Steamboat Com- "pany was, that a decree should go against it for $19,841.56 "in favor of cargo underwriters, who had intervened for them- "selves, and a decree in favor of The Erie & Western Trans- "portation Company, as trustee for cargo underwriters rep- "resented by it, for $12,976.38. That result was reached in "this way:

"Libelant recovers of New York one-half of the damages sustained by the Conemaugh	$15,254.23	
"Recovers one-half of the amount sustained by it as bailee of the cargo	8,813.82	
		$24,068.06
"Less one-half of amount of intervenors' damages paid to cargo intervenors by New York	$ 8,920.78	
"Less one-half of amount of damages sustained by New York	2,170.90	
		11,091.68
		$12,976.38

"While this plan avoided the necessity for an affirm-
"ative decree in favor of the appellant without any pleading
"asking such relief, it did so at the expense of the under-
"writers represented by the appellee, whose claims aggre-
"gated $19,627.67, an amount exceeding the proposed decree
"in their favor by $6,651.29.

"This was clearly and distinctly inadmissible, as not
"conforming to the mandate of the Supreme Court, which
"directed that a decree should go against the New York for
"the whole of the cargo damages, as the only vessel im-
"pleaded by cargo owners or underwriters. Such a decree
"was not in accordance with the mandate, as the Supreme
"Court expressly decided. 178 U. S., 317. The equal division
"directed by that court applied only to the vessels. No
"question of recoupment having been presented or decided
"by the Supreme Court, it was not competent for that court
"to compel the District Court to enter a decree which was
"not required by its original decision. It is now sought to
"inject that proposed decree into this record as a basis for
"assigning as error the failure by the District Court to allow
"recoupment in some form. The decree never was a part of
"the record in the court below, and the fact that it was ever
"proposed as a decree in compliance with the mandate of the
"Supreme Court can only be shown by evidence *de hors* the
"record. No pleading or oral application for recoupment,
"other than may be inferred from it, was ever made to the
"court below. *It was submitted, not by way of an applica-*
"tion to the power of that court over a matter subsequent to
"the mandate and not concluded, but as a decree required by
"the mandate. If it were here we could not regard it as an
"application for recoupment to be granted or refused on its
"merits as a matter subsequent to the mandate, but as an
"application based upon a misconception of the mandate.
"The application for a writ of *certiorari* is refused.

"The right of set-off, or counter-claim, or recoupment,
"being in no way presented by any pleading in the case, was
"not so involved in the nature of the decree rendered as to
"make it error if the matter was passed *sub silentio.*

"It was not a defense which the appellant was obliged
"to then present. The mere fact that there are cross-demands
"will not operate as an estoppel if in fact the cross-demand was
"not presented and adjudicated.

"A set-off or counter-claim is generally admissible in
"equity only when the circumstances are such as to justify
"the interference of equity to prevent injustice or avoid
"circuity of action.

"Clearly it was not admissible to set off the decree in
"favor of the appellee as trustee for underwriters or cargo

"owners who had not intervened, by a claim against the "appellee in a wholly different right. *Manhattan Insurance* "*Co. v. McKown*, 33 C. C. A., 212.

"Neither are we aware of any authority which would "justify an affirmative decree upon a set-off in the absence "of some pleading seeking such affirmative relief. *The Dove*, "91 U. S., 381, 384; *Washington Rd. v. Bradley*, 10 Wall., "299; *The Ethel*, 66 F. R. 140.

"No issue having ever been made as to the liability of "the Conemaugh to her cargo underwriters, it would seem "altogether possible that an injustice might be done if it "should be summarily assumed, that because she was found "in fault and liable to the New York for one-half of her dam-"ages, that she is also liable to the underwriters upon her own "cargo. Counsel for the Conemaugh say that there are special "stipulations in her bills of lading which they [have right] to "set up against the claims of underwriters. Manifestly this "court should not foreclose this defense upon a record which "fails to show that any such right of set-off or recoupment "was ever claimed or asserted in the court below or that the "Conemaugh has ever been called upon to respond to the "claims of her cargo underwriters. Not having been passed "upon in the court of original jurisdiction, this court is not "disposed to hold that the lower court erred in passing the "matter over. *Harding v. Giddings*, 19 C. C. A., 508. *Lloyd* "*v. Preston*, 146 U. S., 630. Neither do we think that inno-"cent third parties should be longer delayed in the collection "of cargo damages, by the delay incident to sending this "case back for the purpose of allowing such pleadings as "would properly present the question. The appellants not "being obliged to assert their cross-demand or claim for con-"tribution by way of recoupment in this cause did not do so. "This leaves them free to assert their claim for contribution in "an independent proceeding against the Conemaugh. No "special equity appearing, this will be no injustice. The "motion to remand with leave to amend the pleadings is, "therefore, denied."

Petitioner presents here the same argument with the same authorities as it presented to this court in the mandamus proceeding in an effort there to establish the proposition of some inherent, self-enforcing quality of the doctrine of recoupment, which would compel a court as matter of law, regardless of pleadings and oblivious to the just rights of the party sought to be charged, to somehow conserve the interest of a condemned *tort feasor* to the extent, if necessary, of giving affirmative decree against one who has never been impleaded or had opportunity of defending.

Each of the three courts, before which this case has been

more than once, has denied the doctrine. This court had previously denied it in *The Juniata*, 93 U. S., 337, and explained the grounds of such denial in *The Beaconsfield*, 158 U. S., 303, and in the explicit determination of the question (175 U. S., 209-210) when this case was first here.

The mandate directed the entry of decree in conformity with the opinion, for execution in conformity with the opinion and decree of this court (Rec. 23). The stereotyped phrase of the mandate, "as according to right and justice and the laws of the United States ought to be had," did not authorize the District Court to "depart in any respect from the judgment of this court."

In re Railroad Company, 140 U. S., 91.
Gaines v. Rugg, 148 U. S., 228-243.

The District Court could not revise or reconsider in any respect the decision, and was entirely without authority to admit "new matter" had such been proffered, without leave of this court.

In re Potts, 166 U. S., 263.

This was an admiralty cause, brought to this court on writ of certiorari and treated as if on appeal; all questions presented in the case were here decided, and the decree entered in pursuance of the mandate was the decree of this court.

Stewart v. Salamon, 97 U. S., 361.
Humphrey v. Baker, 103 U. S., 736.
Southard v. Russell, 16 How., 547-570.

There was no power in the District Court to allow new pleading, amendments or rehearing, and silence upon any point involved in the case would have to be taken as a denial of the point.

In re Railroad Company, 140 U. S., 91.
Texas, &c., Ry. Co. v. Anderson, 149 U. S., 237.

The mandate directed that the decree include interest at the same rate per annum that decrees bear in the courts of the State of Michigan. This may be regarded as investing the District Court with the function of judging and deciding upon that rate, and may be such new matter as could become the subject of appeal in accordance with the intimation of the court in its opinion which accompanied the denial of the application for mandamus; but petitioner was foreclosed of any right of further complaint in this suit.

> " No rule is better settled than that an appeal
> " from a decree entered by the court below in accord-
> " ance with the mandate of the appellate court cannot
> " be maintained."
>
> *Aspin, etc. Co. vs. Billings*, 150 U. S., 31-37.

It seems to us that here is an end of the matter, and our presentation of the case for the Erie & Western Transportation Company should close, but for the fact that in

Hubbard vs. Tod, 171 U. S., 474-494,

this court regarded the contentions of petitioner's brief as assignments of error. It is perhaps due that we should follow somewhat the authorities and argument of the brief.

The libel in this case presented two distinct claims. The Erie & Western Transportation Company was owner of the propeller Conemaugh, and had in its custody as carrier a miscellaneous cargo. Following the settled practice, it sued for the entire damage, setting up distinctly that it claimed for the loss and damage to the steamer in its own right as owner, but as to the loss and damage to the cargo, it stood as bailee and trustee for the cargo owners and underwriters. All the cargo was insured.

Afterwards some of the cargo underwriters intervened without seeking to affect in any manner the issues or the status of the claim. They achieved by intervention no more than the right to urge in their own behalf the right which had been set up by the Erie & Western Transportation Company as trustee.

The right of the ship owner to so proceed is well established, and the right involved is precisely the same as if prosecuted directly by the cargo interest. This court has settled the bailee's right to recover the entire cargo damage in a case where by reason of his own fault he recovers only a moiety of the damage to his ship.

The Beaconsfield, 158 U. S., 303 at 307.

It seems idle to pursue this here since the court in dealing with the character of decree called for by its opinion and mandate, said,

> "It may be true that the decree holds the New York "liable for seventy-six per cent of the entire damages "and not fifty per cent, but this results from the fact "that she was primarily held for the entire value of the "cargo. The equal division applied only to the "vessels."
>
> *Ex-Parte The Union Steamboat Co.*, 178 U. S., 317-320."

The contention now brought forward is that a party may keep a matter out of the suit, as if to present it in an independent action should occasion require, and then after the suit has gone against him under a decision that the matter is not involved but is an entirely new question, may by a bare appeal from the decree entered in approved conformity with the man-

date, bring in this new question by a simple assignment of error to the entering of the approved decree.

Petitioner might possibly, under the ruling in the *North Star*, 106 U. S., 17-27, have made claim of recoupment in its answer or perhaps by cross-libel. Clearly it might have done it under rule 59 without prejudice to its own defense, and according to the decision of this court in *The Beaconsfield*, 158 U. S., 303, that would have been the correct practice.

Speaking of its opinion, this court said (178 U. S., 320):

> "The only questions decided were as to the "respective faults of the two vessels, and the claim of "the underwriters upon the Conemaugh's cargo, that "they were entitled to a recovery to the full amount of "their damages against the New York, notwithstanding "the Conemaugh was also in fault for the collision. "This claim was sustained, and directions given to "enter a decree in conformity to the opinion of this "court. Such decree was entered, dividing the dam- "ages between the two vessels, and awarding to the "underwriters of the cargo a full recovery against the "New York. It may be true that the decree holds the "New York liable for seventy-six per cent of the entire "damages and not fifty per cent, but this results from "the fact that she was primarily held for the entire "value of the cargo. The equal division applied only "to the vessels, and upon the other hand if petitioner be "entitled to the recoupment claimed, it would, appar- "ently, result in an affirmative decree in its favor. But "no question of recouping one-half of such damages to "the cargo from the moiety of damages awarded the "Conemaugh was made by counsel or passed upon by "this court."

After entry of the decree, petitioner, without attempting to bring the matter in any manner or form before the District Court, appealed to the Circuit Court of Appeals for the Sixth Circuit, and as its third assignment of error (Rec. 27) proposed,

> "that the court erred in not permitting the Union "Steamboat Company to offset or recoup any part of "the damages paid on account of loss or the damage to "the cargo of the steamer Conemaugh, against the "claim for damages sustained by the libellant as owner "of the steamer Conemaugh."

But the same difficulty recurs. Just as this court had said that no question of recouping one-half or any part of cargo damage was made by counsel here, whatever legal machinery it might have been permissible to resort to after determination here, nothing was attempted, and the Circuit Court

of Appeals, as already quoted, justly said that the question was not afterwards raised in the case.

So far as recoupment is a right and obtains, it is a definite right, subject to proper limitations. A party is not compelled to resort to it; it is optional whether he assert the right in the orignal suit. Where in case of collision one vessel is libeled, it is optional with the owner of the other vessel to file his counter-claim by way of cross-libel or to bring an independent action. This was determined by this court in *The Juniata*, 93 U. S., 337, and followed in the present case, 175 U. S., 187.

It is true that before the promulgation of Admiralty Rule 59, there was no definite rule which enabled parties to bring before the court all necessary parties, although Judge Addison Brown did not hesitate to decide that on proper application this would be done.

The Hudson, 15 Fed., 162.

Other courts, as in cases cited by petitioner, seem to have undertaken to work out the rights of parties under some notion of "rustic justice." The necessity for resorting to such latent powers of the court, whether by bringing in the parties or working out the equities otherwise, was removed by the adoption of rule 59. This put an end to the right of inferior courts, under authority of the 46th rule, to regulate their own modes of procedure in such cases.

The only case we are aware of in which the precise question has been considered in this court is the *Beaconsfield*, which we think definitely recognizes the force of the 59th rule.

The court said, p. 307 [158 U. S.]:

> "and in case he (the cargo owner) proceed against one "only, and both are held in fault, he may recover his "entire damages of the one sued. A person, who has "suffered injury by the joint action of two or more "wrongdoers, may have his remedy against all or either, "subject, however, to the condition that satisfaction "once obtained is a bar to any further proceeding. "The Atlas, 93 U. S., 302, 315; Lovejoy vs. Murray, 3 "Wall., 1. Did the case rest here, there could be no "doubt of the right of the libelant to recover the "whole damage to the cargo of the Britannia, although, "as owner of the Beaconsfield herself, Cleugh could "recover only a moiety of his damage to the vessel, "in case the collision were adjudged to be the mutual "fault of both vessels."

Then, considering rule 59, which was complied with in that case, to predicate the right of recoupment, the court says (309):

> "Had no petition been filed against the Beaconsfield

" by the French company, the case would have stood
" quite differently, and there would have been no suit
" against the Beaconsfield upon which a decree could
" have been rendered."

The decree of this court in the present case stands upon the same principle. After quoting (175 U. S. 210) from *The Atlas*, language supporting the proposition that a plaintiff suffering loss by the negligence of two parties, is at liberty to sue both or either, and if without fault is entitled to judgment in either case for the full amount, the court quotes further from the same case:

" Co-wrongdoers, not parties to the suit, cannot be
" decreed to pay any portion of the damage adjudged
" to the libelant, nor is it a question in this case
" whether the party served may have process to
" compel the other wrongdoers to appear and respond
" to the alleged wrongful act."

The court also referred to

The Juniata, 93 U. S., 337.

There Pursglove filed his libel against the Juniata for damage to his tug and for personal injuries; the United States also libeled the Juniata. Both the Juniata and the tug were held in fault. Pursglove recovered half his damages, property and personal, against the Juniata; the United States being without fault recovered full damages against the Juniata. Although Pursglove was before the court suing and had decree against the Juniata, yet, as neither he nor his tug had been made a party to the claim of the United States, this court there required the claimants of the Juniata to pay the full damage to the United States, and on the question of claimants' right to recoup or have such relief as petitioner is here seeking, said (340):

" Whatever their rights may be against Pursglove,
" by reason of such payment of more than one-half,
" must be settled in another proceeding. It cannot be
" done in this litigation."

Besides some cases in the lower courts in which the equities were worked out before the rule was adopted, and which will be briefly considered later, petitioner refers to

The North Star, 106 U. S., 17.
The Manitoba, 122 U. S., 97.
The Chattahoochee, 173 U. S., 540.
The Albert Dumois, 177 U. S., 240.

In each the party against whom recoupment would operate invoked the protection of a public statute, and thereby, by operation of law, made himself and any reclamation claim arising from the disaster *party defendant* as to all the damages, or as to the particular claim, with fullest opportunity to

present defense, so that the resulting decree should be conclusive upon all parties, a final and complete adjudication of all liability.

Referring, however, to the cases specifically. The question in the *North Star* was, When can a party thus invoking the benefit of the act have it applied to his liability, before or after that liability is adjusted upon such full consideration of the particular facts in the case as shall enable the court to fix the *ultimate* liability of the party? It was not necessary to consider any such question as we have in this case, because by his own act in invoking the aid of the statute, the party had brought into the case every issue, the determination of which was necessary to the ascertainment of such ultimate liability.

In the *North Star* case there was no question of cargo damage. This came up for consideration in the case of the *Manitoba*, but aside from the consideration above stated, such a question as we have here could not arise. The *Manitoba*, was held liable for one-half of the total damage. There was no occasion for any recoupment, because the bond given on her release in the limited liability proceeding was less than a *moiety* of the damages in the case, and a decree was rendered for the amount of the bond.

The case of the *Chattahoochee* is a similar authority. The precise manner in which the question was brought before the District Court does not appear, but it does appear that in the course of the proceedings in the District Court the libelant himself at some stage of the trial and before final decree presented to that court for adjudication a question, the elements of which are these:

Both vessels are found in fault; here is cargo damage as well as damage to the schooner; under the general law, the schooner would be held to pay one-half the cargo damage, which, the schooner having been lost, might be deducted from the recovery for her own damage; but the Harter act exonerates the carrying vessel from this liability, and the cargo owner must forego this *moiety* of his loss unless, perhaps, the steamer should pay the whole. The limited liability act was also referred to.

An essential point differentiates the cases from the present one, since in each there was of necessity presented every question and every element of every question necessary to the full and final disposition of all the rights, affirmative and defensive, between the cargo owner and the owners of both ships in such manner that the decision of the court thereupon must be final and conclusive. In what particular manner they were thus presented is immaterial to any question that he might raise on the subject. Therefore, as in the other cases, includ-

ing *The Albert Dumois*, 177 U. S., 240, we find no consideration of the question raised here.

When a party has thus had his day in court upon the question of the cargo claim and its effect upon him, he cannot be heard to complain if the trial court decides upon this as an element of the case presented. The very thing was present in each case which we assert is necessary before a person's property may be taken to pay a claim, to wit: that the party to be charged be given an opportunity to present any defense he may have to that claim.

Before a party can have the benefit of limitation of liability, any fund arising from the loss of or damage to the ship must be surrendered.

O'Brien v. Miller, 168 U. S., 287-306.

Of the earlier cases cited in petitioner's brief, perhaps the strongest is

The Eleanora, 17 Blatch., 88, F. C. 4335,

where two separate libels were filed, one for the vessel, the other for the cargo; both vessels were held at fault and the court without much consideration seems to have gone on the impression that if the claim for the cargo damage and for damage to the carrying vessel were presented in the same libel, they became amalgamated into one claim, subject to the same limitations, a doctrine destroyed by this court in the *Beaconsfield*, 158 U. S., 303.

In *The C. H. Foster*. 1 Fed., 733, in which limitation of liability was also involved, the cargo damage was ordered paid into court first, and then, a decree entered which should show that one-half that sum was included in the damage of the ship paying, with leave to amend the libel setting up that damage if the parties thought desirable.

In *The Hercules*, 20 Fed., 205, Judge Lowell said (206):

> "It is true that the question whether the schooner is "excused from liability to the owners of the cargo "shipped on board of her, has not been brought into "the case; and therefore, if there is any ground for "relieving the owners of this liability, they may show "it by supplementary proceedings in the cause."

Treating these cases in a group. They were made before the promulgation of rule 59; later ones are on the authority of these without consideration. The various means adopted were employed in the interests of justice, guarding in some manner against condemning a party without hearing. Each court was at liberty to work out its own procedure in this respect under rule 46.

It was doubtless to correct this deficiency in the admiralty procedure and to avoid the haphazard disposition of this kind

of questions that the rule was adopted, furnishing a standard of practice and procedure competent to bring the question in an orderly way before the court. Rule 46 as well as section 918, Rev. St., provides that the Circuit and District Courts have power to regulate their practice and procedure only in those respects in which it is not controlled and regulated by statute or rule of the Supreme Court. The necessary result of this is that where the Supreme Court does by rule establish a definite procedure, any other is excluded. The rules

> "are little more than a recognition and formulation of "the previous practice of courts of admiralty in this "country and in England. They have come before "this court in several instances, and have always been "treated as obligatory."
>
> *The Corsair*, 145 U. S., 335, 342.

Where the rules prescribe a course it is exclusive of any other.

> *The Illinois*, Brown's Adm., 13; F. C. No. 7003.

We can only understand the expressions of the court in *The Beaconsfield* as supporting this doctrine. In that case the claim was by the owner of the carrying ship for damage to the ship in his own right and as trustee for the cargo owners. The original claimant of the ship proceeded against filed a petition in conformity with Rule 59 to bring in the libelant's vessel, the *Beaconsfield*, as a defendant to the claim asserted as trustee for the cargo owner. In this connection the court said, p. 309:

> "When the Beaconsfield was drawn into the liti- "gation by the petition of the French company, and "his own vessel thus made to respond to his libel, "Cotton should have either withdrawn from the suit, "and asked that Sanbern be substituted, or in his "answer to the petition of the French company should "at least have set up any defense he might have had "against the owner of the cargo, arising under the bill "of lading or from any other cause. If the attention "of the court had then been drawn to the fact that "Cotton was occupying inconsistent positions, it would "doubtless have ordered the owner of the cargo to be "substituted for him as libelant. Had no petition been "filed against the Beaconsfield by the French company, "the case would have stood quite differently, as there "would have been no suit against the Beaconsfield "upon which a decree could have been rendered."

This is the present case; no petition was filed, and libelant recovers full damages for its *cestuis que trust*, underwriters on cargo, but by reason of its fault, only a *moiety* of its own damage. There is no suit against the Conemaugh or her

owner in which a decree can be rendered. If the appellant, as claimant of the New York, has any claim against the Conemaugh or her owner, by reason of her payment of cargo damage, having failed to put the matter in form for determination in this proceeding it must be relegated to an independent proceeding, as in *The Juniata*, 93 U. S., 337.

Petitioner's contention that it is not necessary that the record show that recoupment was demanded in the District Court in any manner, because the trial in the "Circuit Court" is *de novo*, so that a simple demand in argument in the Circuit Court of Appeals should be acted upon and granted as of course, begs the question.

After the Circuit Court of Appeals had in turn decided that up to the time of its decision the question of recoupment had never in any manner been brought properly into this case, the petitioner made some sort of application to remand the case with leave to amend. What it was cannot be stated, as no particulars of the proposed amendment seem to have been submitted. It can only be gathered from what the court said (Rec. 48):

> "No issue having ever been made as to the liabil-
> "ity of the Conemaugh to her cargo underwriters, it
> "would seem altogether possible that an injustice might
> "be done if it should be summarily assumed, that
> "because she was found in fault and liable to the New
> "York for one-half of her damages, that she is also
> "liable to the underwriters upon her own cargo. Coun-
> "sel for the Conemaugh say that there are special stipu-
> "lations in her bills of lading which they [have right] to
> "set up against the claims of the underwriters. Man-
> "ifestly this court should not foreclose this defense
> "upon a record which fails to show that any such right
> "of set-off or recoupment was ever claimed or asserted
> "in the court below or that the Conemaugh has ever
> "been called upon to respond to the claims of her
> "cargo underwriters. Not having been passed upon
> "in the court of original jurisdiction, this court is not
> "disposed to hold that the lower court erred in passing
> "the matter over. *Harding v. Giddings*, 19 C. C. A.,
> "508. *Lloyd v. Preston*, 146 U. S., 630. Neither do
> "we think that innocent third parties should be longer
> "delayed in the collection of cargo damages, by the
> "delay incident to sending this case back for the pur-
> "pose of allowing such pleadings as would properly
> "present the question. The appellants not being
> "obliged to assert their cross-demand or claim for
> "contribution by way of recoupment in this cause did
> "not do so. This leaves them free to assert their

"claim for contribution in an independent proceeding
"against the Conemaugh. No special equity appear-
"ing, this will be no injustice. The motion to remand
"with leave to amend the pleadings is, therefore,
"denied."

The Circuit Court of Appeals under the principle of trial *de novo* has no right to go outside of the record and try some other case on issues which had never been presented in any court.

If we should grant for the purpose of argument, right to file new pleadings or make amendments and bring in new issues, the right is not an open one and must be subject to reasonable discretion and control by the court. Clearly a court should exercise such a power sparingly and with true discretion to prevent injustice.

The case of *Gilchrist v. Chicago Ins. Co.*, 104 Fed., 566, goes as far in the matter of trial *de novo* as any of the cases, but the utmost there suggested by Justice Harlan limits the holding to issues made in the pleadings, the Honorable Justice saying (571):

"This court may properly consider and determine every
"issue raised by the pleadings, and, without regard to
"the decree below, direct such a decree to be entered
"here as is consistent with law."

We respectfully submit that the decree entered by the District Court in conformity with the mandate as sanctioned and confirmed by this court in 178 U. S., 317, and in respect of which no new matter has been presented since, should be affirmed.

HARVEY D. GOULDER,
Proctor for Erie & Western
Transportation Company.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

No. 97.

FILED
OCT 6 19
JAMES H. McKENNEY

Supreme Court of the United States.

Motion for leave to intervene

THE UNION STEAMBOAT COMPANY, Claimant of the propeller "NEW YORK," Petitioner,

AGAINST

THE ERIE AND WESTERN TRANSPORTATION COMPANY and others.

Filed Oct. 6, 1902.

No. 97.
October Term, 1902.

2

Upon the annexed petition and consent, and upon all proceedings herein, I shall make a motion before the Supreme Court of the United States in Washington on the second Monday of October, 1902, to wit, October 13th, at the opening of the court upon that day, or as soon thereafter as counsel can be heard, for leave to the Mannheim Insurance Company, the Firemen's Fund Insurance Company of San Francisco, the London Assurance Corporation and the British and Foreign Marine Insurance Company, Limited, to intervene herein in respect of their respective interests in the moneys heretofore decreed to the Erie and Western Transportation Company, as Trustee for owners and underwriters of cargo, and to appear by their proctor.

3

New York, September 25, 1902.

WILHELM MYNDERSE,
Proctor for Mannheim Insurance Company and others.

To HARVEY D. GOULDER, Esq.,
Proctor for Erie and Western Transportation Co.

FRANK H. CANFIELD,
Proctor for Erie and Western Transportation Co., as Trustee.

C. E. KREMER,
Proctor for Union Steamboat Co.

SUPREME COURT OF THE UNITED STATES.

THE UNION STEAMBOAT COMPANY, Claimant of the Propeller "NEW YORK,"
Petitioner,

AGAINST

THE ERIE AND WESTERN TRANSPORTATION COMPANY and others.

No. 97.
October Term, 1902.

The petition of the MANNHEIM INSURANCE COMPANY, the FIREMEN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, the LONDON ASSURANCE CORPORATION, and the BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED, sets forth as follows:

On October 21, 1891, the steamer *Conemaugh*, bound on a voyage from Milwaukee, Wisconsin, to Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting chiefly of flour, bran, white lead and oil cake, came into collision with the steamer *New York*. By the collision the *Conemaugh* and her cargo sustained serious injuries.

Thereafter, on November 11, 1891, the owners of the *Conemaugh* filed a libel against the *New York* in the District Court of the United States for the Eastern District of Michigan, claiming damages in the amount of ten thousand dollars for salvage expenses, twenty thousand dollars for injuries to the hull of the *Conemaugh*, ten thousand dollars for loss of use of the *Conemaugh*, and thirty thousand dollars for damage to the cargo of the *Conemaugh*, and prayed recovery for the damages sustained by it as owner of the *Conemaugh*, and also as trustee for the owners of her cargo (Libel, Art. 6, p. 5).

The petitioners, the Mannhein Insurance Company, the Firemen's Fund Insurance Company of San Francisco,

the London Assurance Corporation, and the British and 7
Foreign Marine Insurance Company, Limited, respectively, had made insurance upon certain lots of said cargo for the benefit of the owners thereof, and by reason of the collision and the consequent damage to the said cargo have been compelled to pay and have paid to the said owners losses for which the suit has been prosecuted by the said Erie and Western Transportation Company, as trustee.

Other lots of cargo were otherwise insured, and the underwriters thereon, as the petitioners are informed and believe, have heretofore intervened in said cause with the effect that they made specific recoveries in respect of their losses.

In due course the action came into this court with the result that in February, 1900, this Court issued its man- 8
date to the District Court of the United States for the Eastern District of Michigan, to reverse the then existing decree and to enter a new decree based upon the fault of the two steamers.

Thereupon, on March 24, 1900, the said District Court entered a decree under said mandate, whereby, among other things, it provided that the said Erie and Western Transportation Company should recover the sum of nineteen thousand six hundred and twenty-seven dollars and sixty-one cents ($19,627.61), with interest thereon from July 3, 1896, "in trust for the owners and underwriters of cargo."

The petitioner shows that the owners of the said cargo have been fully paid their losses by the petitioners respect- 9
ively, and that said recovery, made as aforesaid by the said Erie and Western Transportation Co., in trust, is due to the petitioners according to their respective interests.

Wherefore, the petitioners pray leave to intervene for their respective interests, and to appear in the action to the end that the amount due each of them may be specifically decreed to them.

WILHELMUS MYNDERSE,
Proctor for Petitioners,
54 Wall Street,
Borough of Manhattan,
City of New York.

City of New York, }
Southern District of New York, } ss.:

Franz Herrmann, being duly sworn, says: That he is Manager in the City of New York of the Mannheim Insurance Company; that he has read the foregoing petition and knows the contents thereof, and that the same is true according to his best knowledge, information and belief; that said Mannheim Insurance Company is a corporation organized and existing under and pursuant to the laws of the Empire of Germany; that none of its executive officers reside within or now are in this country; wherefore this verification is made by deponent.

Franz Herrmann.

Sworn to before me this 25th day of September, 1902.

Chas. Flynn,
Notary Public,
N. Y. Co.

[seal.]

SUPREME COURT OF THE UNITED STATES.

Union Steamboat Company, claimant of the Propeller "New York,"
Petitioner,
against
Erie and Western Transportation Company and Others.

No. 97.

It is hereby consented that the Mannheim Insurance Company, the London Assurance Corporation, the British and Foreign Marine Insurance Company, Limited, and the Fireman's Fund Insurance Company of San Francisco, underwriters of cargo on the steamer *Conemaugh*, intervene and appear herein by Wilhelmus Mynderse, their

proctor, for their respective interests in the amount of $19,627.67 awarded to the "Erie and Western Transportation Company, Trustee for Owners of cargo and Underwriters," under the decree of the District Court of the United States for the Eastern District of Michigan, now under review by *certiorari;* and that any appropriate order be entered accordingly hereon. 13

Dated September 8, 1902.

C. E. KREMER,
Proctor for Petitioner.

HARVEY D. GOULDER,
Proctor for Erie and Western Transportation Company.

F. H. CANFIELD, 14
Proctor for Erie and Western Transportation Company, as Trustee.

WILHELMUS MYNDERSE,
Proctor for Underwriters.

No. 97.

Bef. of Mynde

Filed

Supreme Cour

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THE UNION STEAMBOAT

THE ERIE AND WESTER

OWNER OF STEAMBOAT

THE MANNHEIM INS

Brief fo

WILHELMUS MYNDERSE,

Advocate

1348

Office Supreme Court U.S.
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...derse for [illegible]
et al. intervenors in
Oct. 28, 1902.

...urt of the United States.

No. 97.
...ctober Term, 1902.

...AT COMPANY, CLAIMANT OF THE STEAMBOAT NEW YORK,

Petitioner,

vs.

...ERN TRANSPORTATION COMPANY, AS ...AT CONEMAUGH, AND AS TRUSTEE, &c.,

Libellant,

and

...INSURANCE COMPANY AND OTHERS,

Intervenors.

...for Intervenors.

...ate.

1348

Supreme Court of the United States.

THE UNION STEAMBOAT COMPANY, Claimant of the steamboat NEW YORK, *Petitioner*, vs. THE ERIE AND WESTERN TRANSPORTATION COMPANY, as Owner of the steamboat CONEMAUGH, and as Trustee, &c., *Libellant*, and THE MANNHEIM INSURANCE COMPANY, and others, *Intervenors*.	No. 97. October Term, 1902.

BRIEF FOR INTERVENORS.

This action arose out of a collision between the steamers *Conemaugh* and *New York*, occurring October 21, 1891.

At the time of the collision the *Conemaugh* was bound from Milwaukee, Wisconsin, to Erie, Pennsylvania, with a cargo of about 1,800 tons of package freight, consisting principally of flour, bran, oilcake and pig lead (*Libel, Art. 2, p. 3*). The *New York* was bound from Buffalo, New York, to Milwaukee, Wisconsin (*Answer, Art. 4, p. 7*).

The side of the *Conemaugh* was crushed by the collision and in consequence thereof, she sank with her cargo (*Libel, Art. 3, p. 4*). She was subsequently raised, but both she and her cargo were seriously damaged (*Libel, Art. 5, p. 5*).

The Erie and Western Transportation Co., owner of the *Conemaugh*, filed a libel in the District Court of the United States for the Eastern District of Michigan, November 11, 1891, three weeks after the collision, asserting damages in the amount of $10,000 as the estimated expense of raising the *Conemaugh* and her cargo, in the amount of $20,000 as the estimated cost of repairs to the *Conemaugh*, in the amount of $10,000 as the value of the probable earnings of the *Conemaugh* during the period of repairs, and in the amount of $30,000 as the estimated damage to the cargo (*Libel, Art. 5, p. 5*).

The libel then summarized the claims as follows:

> "On account of said collision the aggregate amount of "damage here sued for and sustained by the libellant as "the owner of the said propeller *Conemaugh* and also as "trustee for the owners of the said cargo, is, as near as "the same can be ascertained, the full sum of seventy "thousand dollars ($70,000)" (*Libel, Art. 6, p. 5*).

Thereafter the Insurance Company of America, the British and Foreign Marine Insurance Company (Lim.), the Union Marine Insurance Company, and the Marine Insurance Company (Lim.), underwriters upon cargo of the *Conemaugh* intervened in respect of their interests in the claim which had been put forward by the owners of the *Conemaugh* as trustee. (*Stipulation, pp. 23-24, Decree, pp. 24-25*).

The petition of the Insurance Company of North America for leave to intervene was filed October 8, 1894 (*Petition, pp. 15-19*).

The record does not indicate the dates upon which the other underwriters intervened.

The answer of the claimant of the *New York* alleged that she had "sustained damages to her stem and other parts of her forward" (*Answer, Art. 6, p. 8*), but did not measure the amount.

A cross-libel filed upon the hearing of the cause in the District Court declared the damages of the *New York* to be $3,000 (*Cross Libel, Art. 4, p. 11*), and these dam-

ages were afterwards more accurately measured by stipulation in the amount of $4,841.80, "including interest to July 3,1896." (*Stipulation, pp. 23–24*).

The District Judge after the original hearing of the cause filed an opinion holding both vessels in fault.

The New York, 58 Fed. Rep., 553.

Upon a motion for a rehearing he so far modified his first decision as to hold the *New York* solely in fault (*Record, pp. 13–15*), and a decree of the District Court was entered accordingly.

Upon appeal this decree was reversed by the United States Circuit Court of Appeals in an opinion holding that the *Conemaugh* was solely in fault.

The New York, 82 Fed. Rep., 819.

The mandate of the United States Circuit Court of Appeals issued accordingly (*Mandate, p. 21*); but its operation was stayed by a writ of *certiorari* issued out of this Court.

Upon the hearing of the cause in this Court on the writ of *certiorari* both vessels were held in fault.

The New York, 175 U. S., 187.

The mandate of this Court issued accordingly to the District Court of the United States for the Eastern District of Michigan under date January 22, 1900.

Mandate, pp. 22, 23.

The material portions of the judgment and mandate of this Court were:

"On consideration whereof, it is now ordered, adjudged "and decreed by this Court that the decree of the said "United States Circuit Court of Appeals in the cause be "and the same is hereby reversed; the claimant of the "*Conemaugh* and the claimant of the *New York*, each to "pay one-half of all costs in this cause.

"And that the said Erie & Western Transportation "Company recover against the Union Steamboat Com-"pany $276.75 for one-half of the costs herein expended, "and have execution therefor.

"And it is further ordered that this cause be and the "same is hereby remanded to the District Court of the

" United States for the Eastern District of Michigan, with " direction to enter a decree in conformity with the " opinion of this Court, with interest from July 3, 1896, " until paid, at the same rate per annum that decrees bear " in the courts of the State of Michigan " (*Mandate, pp. 22, 23*).

Thereupon the District Court made its further decree, which is now under review by this Court (*Decree, pp. 24, 25*).

It first gave judgment in favor of the several intervening underwriters upon cargo for their respective claims, with interest at seven per cent., from July 3, 1896.

Those judgments have been paid by the petitioner (*3 Assignment of Error, p. 27*).

The decree then provided as follows:

" And it further appearing that the owners of said cargo " and their underwriters, other than the intervenors, " have suffered damage by said collision in the sum of " $19,627.67, for which the said Erie & Western Trans- " portation Company appears in this suit as trustee only, " it is further ordered, adjudged and decreed, that said " trustee recover from the said Union Steamboat Com- " pany and its surety, in trust, for the said owners of and " underwriters on cargo, the aforesaid sum of $19,627.67, " with interest thereon at the rate of seven per cent. per " annum, from July 3, 1896, until paid, and that it have " execution therefor."

It next gave judgment in favor of the owner of the *Conemaugh* for one-half of the damages of that steamer, less one-half of the damages of the *New York*, with interest.

Finally it adjudged costs (*Decree, pp. 24. 25*).

The claimant of the *New York* then applied to this Court for a writ of mandamus directing the District Judge to cure certain alleged errors in the decree.

This application was denied by this Court with a suggestion that the decree could be reviewed only by appeal and not under a petition for mandamus.

Ex parte Union Steamboat Co., 178 U. S., 317.

The claimant of the *New York* thereupon filed assignments of error to this decree (*Assignments of Error, pp. 26, 27*), and prayed an appeal to the United States Court of Appeals (*Appeal, p. 26*).

Upon the hearing of the appeal, the United States Court of Appeals filed an opinion that a trifling error in the apportionment of costs should be corrected, and that otherwise the decree of the District should be affirmed (*Opinion, pp. 43-52*).

Before any further steps were taken in the United States Circuit Court of Appeals, a writ of *certiorari* issued out of this Court, by which all proceedings then in the United States Circuit Court of Appeals were brought here for review (*Writ of Certiorari, p. 52*).

POINTS.

First.

THE ONLY PROCEEDINGS NOW UNDER REVIEW ARE THOSE TAKEN UNDER THE MANDATE ISSUED OUT OF THIS COURT, JANUARY 22, 1900.

The questions before the Court are

First—Whether the decree entered by the District Court was in conformity with the mandate of this Court; and

Second—Whether any errors in such decree were duly brought before the United States Circuit Court of Appeals for review; and

Third—Whether the United States Circuit Court of Appeals erred in its disposition of the questions so brought before it.

The present proceeding is akin to an appeal taken to this Court under the old practice from a decree entered by an inferior court upon the mandate of this Court.

Such an appeal brought before this Court for review only the action of the lower Courts since the issuing of the mandate.

Ex parte Sibbald vs. *United States*, 12 Peters, 488, 492.
The Lady Pike, 96 U. S., 461.
The Nuestra Senora de Regla, 108 U. S., 101.
Kreiger Shelby Ry. Co., 125 U. S., 39.
Egan vs. *Hart*, 165 U. S., 188.
Thompson vs. *Maxwell*, 168 U. S., 451, 456.
Ex parte Union Steamboat Co., 178 U. S., 317, 320.

All questions relating to the navigation of the two vessels and to their respective faults, and to the rights of the cargo underwriters to a full recovery of their damages against the *New York* were settled forever by the former decision of this Court, reported in *The New York*, 175 U. S., 187.

The question of the right of the cargo to recover its full loss from the *New York* was settled by that decision.

That decision declared and determined the law of the case upon all questions then before the Court.

Second.

SO FAR AS THE CARGO INTERESTS ARE CONCERNED THE DECREE OF THE DISTRICT COURT GIVING THEM A FULL RECOVERY AGAINST THE NEW YORK, WITHOUT DIMINISHMENT THROUGH RECOUPMENT, IS IN FULL ACCORD WITH THE MANDATE.

A. The mandate, so far as the award of damages was concerned, directed the District Court "to enter a decree in conformity with "the opinion of this Court."

(*Mandate, p. 23.*)

The opinion of the Court, to which such reference is made in the mandate, held both the *Conemaugh* and the *New York* in fault, and that therefore their damages must be divided.

Further it held, in respect of the cargo:

"The final question arises upon the insistence of the "underwriters of the *Conemaugh's* cargo, that they are "entitled to a recovery to the full amount of their dam- "ages against the *New York*, notwithstanding the *Cone-* "*maugh* may also be in fault for the collision. They are "correct in this contention. Indeed, this Court has al- "ready so decided in the case of *The Atlas*, 93 U. S., 302, "315, 317. This was a libel against the *Atlas* by an insurer "of the cargo of a canal boat in tow of the steam tug *Kate*, "whereby the canal boat and her cargo were lost. It was "insisted by the claimant that, as the libellant had failed "to make the *Kate* a party, and as both vessels were found "to be in fault for the collision, there could be a recovery "of only a moiety of the damages. The case of *The Milan*, "Lush., 388, was confidently relied upon as an authority. "This court, however, was of opinion that a plaintiff, who "has suffered a loss by the negligence of two parties, was "at liberty, both at common law and in admiralty, to sue "both wrongdoers or either one of them at his election, "and 'it is equally clear that, if he did not contribute to "'the disaster, he is entitled to judgment in either case "'for the full amount of his loss. He may proceed "'against all the wrongdoers jointly, or he may sue them "'all or any one of them separately. * * * Co- "'wrongdoers, not parties to the suit, cannot be decreed "'to pay any portion of the damage adjudged to the "'libellant, nor is it a question in this case whether the "'party served may have process to compel the other "'wrongdoers to appear and respond to the alleged "'wrongful act.' A like ruling was made in *The Juni-* "*ata*, 93 U. S., 337, in which a libel was filed by the "United States as owner of the cargo of a flatboat in tow "of one of two vessels."

The New York, 175 U. S., 187, 209.

This ruling was in accord with earlier decisions of the Court.

The Atlas, 93 U. S., 312.
The Juniata, 93 U. S., 337.
The Virginia Ehrman, 97 U. S., 312.
The Beaconsfield, 158 U. S., 303.

The " law of the case " so far as the cargo interests are concerned was thereby declared and determined, and the direction of the mandate established the rule of conduct for the District Court.

The present contention of the petitioner that the cargo interests should recover only so much from the *New York* as will equalize the burdens of the two steamers, and should then seek recovery of the balance of their claims through fresh suits against the *Conemaugh*, would override the rule already expressly laid down in this case.

B. The fact that the recovery on behalf of certain of the cargo interests was made in the name of the shipowner " as trustee " is immaterial.

There is no confusion between the interests of the *Conemaugh's* cargo and the interests of the *Conemaugh* herself.

The Beaconsfield, 158, U. S., 303, 307.

At the outset of the litigation the line of demarcation was clearly drawn.

The libel filed by the owner of the *Conemaugh* set up separately the items of loss to the steamer and to her cargo (*Libel, Art. 5 p. 5*) and then alleged:

" The aggregate amount of damage here sued for and " sustained by the libellant *as owner* of the said propeller " *Conemaugh* and also *as trustee* for the owner of the " said cargo, is, as near as the same can be ascertained, " the full sum of seventy thousand dollars " (*Libel, Art. 6, p 5*).

At that time, only three weeks after the collision, there had been no opportunity to adjust the details of losses. Thereafter certain of the cargo underwriters specifically intervened in the cause, and asserted for themselves their respective interests (*Petition, pp. 15, 19; Stipulation, pp. 23, 24*), and took a decree in their own names for their losses (*Decree, pp. 24, 25*).

The other cargo underwriters permitted their interests to remain in the representation of the shipowner " as trustee "; but this Court, in determining the rights of the

cargo when the case was first heard here, made no discrimination against them.

The New York, 175 U. S., 187.

Nor did the District Judge when he entered the decree of his Court under the mandate of this Court.

While he gave to each of the intervening cargo underwriters specific decrees for their respective losses, he recognized just as fully the identity of the losses of the other cargo interests by the following provision:

"And it further appearing that the owners of said cargo "and their underwriters, other than the intervenors, have "suffered damage by said collision in the sum of $19,- "627.67 for which the said Erie & Western Transporta- "tion Company appears in this suit *as trustee only*, it is "further ordered, adjudged and decreed that said trustee "recover from the said Union Steamboat Company, and "its surety, *in trust, for the said owners and under- "writers on cargo* the aforesaid sum of $19,627.67, with "interest thereon at the rate of seven per cent. per "annum from July 3, 1896, until paid" (*Decree, p. 25*).

The *New York* has paid the decree in favor of the intervening cargo underwriters (*3d Assignment of Error, p. 27*), and now seeks to avoid the payment of other losses of the same class, at least so far as such payment would impose upon her, in connection with her own losses and the amounts already paid by her, a greater burden than one-half of all losses.

C. The present contention of the petitioner that recoupment should be allowed, even at the cost of those cargo underwriters whose interests have been represented by the owner of the *Conemaugh* as trustee, is unsound.

Recoupment is claimed by the petitioner against the owner of the *Conemaugh* both in respect of the claim put forward in the interest of the *Conemaugh* and in respect of the claim put forward as trustee for cargo underwriters.

When application was made to this Court for a writ of *mandamus* to require the District Judge to modify the decree entered by him under the mandate, so that it should provide for such recoupment, the Court said:

"But no question of recouping one-half of such dam-
"ages to the cargo from the moiety of damages
"awarded the *Conemaugh* was made by counsel or passed
"upon by this Court. It is now insisted that under the
"cases of *The Chattahoochee*, 175 U. S., 540, and *The*
"*Albert Dumois*, 177 U. S., 240, this should have been
"done. This may be so, but it is an entirely new ques-
"tion quite unaffected by the case of the *New York*, and
"if the Court erred in refusing to allow such recoupment
"the remedy is by appeal and not by mandamus."

Ex parte Union Steamboat Co., 178 U. S., 318, 320.

Taking up the question as a new one: Should recoupment be permitted, and, if so, to what extent and at whose expense?

The counsel for the *Conemaugh* presents reasons why recoupment should not be permitted now in this cause to the diminution of the decree made in favor of the owner of that vessel. Recoupment should not be permitted to the diminution of the decree made in favor of the shipowner as trustee for cargo underwriters.

The shipowner, so far as the cargo is concerned, occupies a purely representative.

A trustee has no right to himself apply the money of his ward to the satisfaction of his own debt; and, of course, a Court would not direct such application.

Here the petitioner has paid those cargo underwriters who intervened prior to the last District Court decree (*3d Assignment of Error, p. 27*), and now asks that the amount of such payment (together with the petitioner's own losses) be offset or recouped against the amounts due from the petitioner to other creditors of the same class sufficiently to equalize the burdens of the two steamers.

Logically under such contention, by a slight change of figures, the entire claims against the petitioner of those cargo underwriters who have been represented by the shipowner as trustee might be *extinguished* by the fact that the petitioner had paid other cargo underwriters in full.

Two cargo owners, having equal interests, might, side by side and at joint expense, pursue the owner of a colliding

ship through the Courts for years; and then such shipowner might pay one cargo owner in full, plead such payment as a satisfaction of his share of the liabilities arising from the collision, and lawfully remit the other cargo owner to a new suit against the other shipowner.

D. The claim of the petitioner to recoupment at the cost of the cargo underwriters was not presented by its appeal to the Circuit Court of Appeals.

The writ of *certiorari* of this Court was issued to the Circuit Court of Appeals (*writ of certiorari, p. 52*), and called for the record as it then stood in that Court. That record related to the assigned errors of the District Court, and to such errors only.

The present petitioner had appealed from the decree of the District Court (*Appeal, p. 26*), and had assigned errors in accordance with the rules and practices of the Court, which provide:

Rule 11. "The plaintiff in error, or appellant shall file " with the Clerk of the Court below, with his petition for " the writ of error or appeal, an assignment of errors, " which shall set out separately and particularly each " error asserted and intended to be urged. No writ of " error or appeal shall be allowed until such assignment " of errors shall have been filed. When the error alleged " is to the admission or to the rejection of evidence, the " assignment of errors shall quote the full substance of " the evidence admitted or rejected. When the error al- " leged is to the charge of the Court, the assignment of " error shall set out the part referred to *totidem verbis*, " whether it be in instructions given or in instructions " refused. Such assignment of errors shall form part of " the transcript of the record, and be printed with it. " When this is not done, counsel will not be heard, except " at the request of the Court; and errors not assigned " according to this rule will be disregarded, but the Court, " at its option, may notice a plain error not assigned."

Rules U. S. Circuit Ct. of Appeals, 6th Circuit.

The only assignment of error filed by the petitioner that relates specifically to a claim to recoupment is the third, which is:

"Third, That the Court erred in not permitting the " Union Steamboat Company to offset or recoup any part

" of the damages paid on account of loss or the damage to " the cargo of the steamer *Conemaugh* against the claim " for damages sustained by the libellant *as owner* of the " steamer *Conemaugh*."

(*Third Assignment of Error, p. 27.*)

The libel had drawn carefully a line of distinction between the claim of the libellant " *as the owner* of the said propeller *Conemaugh*" and its claim " *as trustee* for the owners of the said cargo (*Libel, Art. 6, p. 5*); and likewise the decree against which error was assigned had provided specifically that the libellant should recover one item as " being one-half of the damage to said *Conemaugh*, less " one-half of the damage suffered by the said *New York*," and another item as trustee " in trust for the said owners " and underwriters on cargo" (*Decree, p. 25*).

When, therefore, the appellant assigned error in that the decree did not permit an offset or recoupment " against " the claims for damages sustained by the libellant *as* " *owner* of the *Conemaugh*," the assignment fitted exactly the form of the decree, and effectively disclaimed any right of offset or recoupment against the recovery allowed to the libellant " as trustee."

Position was thereby definitely taken by the libellant, and thereafter the libellant had no right to ask the Circuit Court of Appeals to consider the right or the wrong of an offset or recoupment against the trust fund.

Van Gouden vs. *Iron Co.*, 3 C. C. A., 294.
City of Findlay vs. *Pertz*, 26 C. C. A., 662, 665.
Lloyd vs. *Chapman*, 53 C. C. A., 474, 475, 476.
McFarlane vs. *Golling*, 22 C. C. A., 23, 24.
Savings & Loan Society vs. *Davidson*, 38 C. C. A., 365, 371.

The Circuit Court of Appeals, upon the record before it, could not consider an offset or recoupment against the trust fund.

That record has been brought before this Court for its action; but it would seem that such action must be sub-

ject to the same limitations that were operative in the Circuit Court of Appeals.

E. Any confusion that existed through the dual role of the libellant in appearing first in its own interest to recover its own damages, and, secondly, in the interest of the owners and underwriters of cargo to recover as trustee their damages, is eliminated by the intervention in this Court of those underwriters who had not intervened in the District Court, but who had been content with representation by their trustee.

By order duly entered October 20, 1902, the Mannheim Insurance Company, the London Assurance Corporation, the Firemen's Fund Insurance Company and the British and Foreign Marine Insurance Company (Limited) have been permitted to intervene in this Court and to appear for the protection of their respective interests in the amount of $19,627.67 awarded to the libellant as trustee for owners and underwriters of cargo by the decree now under review.

Order U. S. Supreme Court, October 20, 1902.

Third.

THE DISTRICT COURT PROPERLY DECREED INTEREST AT THE RATE OF SEVEN PER CENT PER ANNUM.

The mandate of this Court under which the District Court acted, directed that interest upon the decree should "be at the same rate per annum that decrees bear in the "courts of the State of Michigan" (*Mandate, p. 23*).

The District Court decreed interest at the rate of seven per cent. per annum—

"that being the rate per annum that judgments and de-"crees bear in the courts of Michigan under the statutes "of said State."

Decree, p. 24.

The petitioner assigned as error:

" That the court erred in allowing interest on the vari-
" ous sums decreed to be due to the libellant and the in-
" tervenor at the rate of seven per cent. per annum."

Second Assignment of Error, pp. 26, 27.

Upon appeal, the United States Circuit Court of Appeals held that the allowance of interest at the rate of seven per cent. per annum was correct.

Opinion, pp. 48-51.

Under the most recent compilation of the public laws of Michigan, made in 1897, the allowance of interest upon decrees at the rate of seven per cent. per annum is explicitly directed.

Sec. 6. " Interest may be allowed and received upon all
" judgments at law for the recovery of any sums of
" money, and upon all *decrees* in chancery for the pay-
" ment of any sum of money, whatever may be the cause
" or form of action or suit in which such judgment or
" decree shall be rendered or made; and such interest
" may be collected on execution, *at the rate of seven per*
" *centum per annum;* Provided, that on a judgment ren-
" dered on any written instrument, having a different
" rate, the interest shall be computed at the rate speci-
" fied in such instrument, not exceeding ten per centum."

Section 4865 Compiled Laws of Michigan, 1897.

The provision there incorporated in the compiled laws was made a law in Michigan in 1855, in amending Section 8 of Chapter 6 of the Revised Statutes of 1838.

Session Laws of 1855, p. 31.

It next appeared in a compilation of the public statutes of Michigan made in 1857 under authority given by the Legislature.

Section 1317 Compiled Laws of Michigan, 1857.

Then it appeared in a similar compilation made in 1871.

Section 1635 Compiled Laws of Michigan, 1871.

It appeared again in a compilation made in 1882.

Section 1597, Howell's Annotated Statutes.

And finally in the compilation of 1897.

Section 4865, Compiled Laws of Michigan, 1897.

Each of these issues of public statutes was made under legislative authority by Commissioners duly appointed to collect and compile all the general laws "*in force*" in the State.

There is no room for difference of opinion respecting the meaning of the statute which we have quoted.

The petitioner, in support of its assignment of error, does not seek any different construction of the terms of the statute than that adopted by the District Judge.

It insists, however, that the statute was repealed in 1891 by an act which established six per cent. per annum as the lawful rate of interest, and that the rate of interest was further reduced to five per cent. in 1899.

The Act of 1891 was of four sections, and was entitled:

"An Act to regulate the interest of money on account, "interest on money judgments, verdicts, etc."

Session Laws of 1891, p. 197.

The first section of this Act was:

"Section 1. The People of the State of Michigan enact: "That the interest *of money* shall be at the rate of six "dollars upon one hundred for a year, and at the same "rate for a greater or less sum, and for a larger or shorter "time, except that in all cases it shall be lawful for the "parties to stipulate in writing for the payment of any "rate of interest not exceeding eight per centum per "annum; provided, that this Act shall not apply to exist-"ing contracts, whether the same be either due, not due "or part due."

The second section provided only that a stipulation for usurious interest should not make the contract void.

The third section provided only that it should be the duty of a Court to declare void all interest upon any contract made in violation of the Act.

The fourth section was:

"Section 4. All Acts or parts of Acts contravening the "provisions of this Act are hereby repealed."

Session Laws of 1891, p. 198.
Section 4856, Compiled Laws of Michigan, 1897.

The later Act of 1899 merely re-enacted the first section of the Act of 1891, substituting five per cent. for six per cent. as the standard interest rate "of money," and substituting seven per cent. for eight per cent. as a permissible rate under special stipulation.

Session Laws of 1899, p. 324.

It is to be noted that neither the Act of 1891 nor the Act of 1899, make any provision in the body of those acts for the rate of interest on judgments or decrees; but that in each of said Acts provision was made only for the rate of interest "of money."

As far back as 1838 the statutes of the State distinguished between interest "of money" and interest on "judgments" and "decrees."

The third section of Chapter 6 of the Revised Statutes of 1838 provided:

"The interest *of money* shall continue to be at the rate "of seven dollars and no more, upon one hundred dol- "lars for a year, and at the same rate for a greater or less "sum, and for a longer or shorter time, &c."

And the eighth section of the same chapter provided:

"Interest may be allowed and received upon all judg- "ments at law for the recovery of any sums of money "and upon all decrees in chancery, &c."

The one section supplied the phrases and form of the Acts of 1891 and 1899 relating to interest of "money"; while the other, after amendment in 1855, has stood unchanged for forty-seven years.

The contention of the petitioner that the fourth section of the Act of 1891 repealed the existing provision for interest on judgments and decrees is unsound.

That section repealed only "all acts, or parts of contravening the provisions" of the Act of 1891.

The Act of 1891 related in terms only to interest "of money," and the petitioner, to give body to its contention, is forced to claim that the Act in all its provisions, including the repealing section, relates not only to interest "of money," but also to interest "on judgments, &c.," because title of the Act is

"An Act to regulate the interest of money on account, "interest on money judgments, verdicts, etc."

Session Laws of 1891, p. 197.

This contention requires that "decrees" be included in the "etc." of the title to the Act.

There are several lines of argument against the contention of the petitioner.

A. The repeal of a statute is not to be effected by inference or by implications but only by express legislation.

Rosecrans vs. *United States*, 165 U. S., 257–262.

The United States Circuit Court of Appeals well defined the status of the title of an Act:

"While the title of an Act should not be altogether "ignored and may afford a key to unlock the meaning of "a very doubtful statute, yet the title of an Act cannot "be used to extend the provisions of an Act so as to in- "clude within its scope that which without such aid "would plainly not be included. *Hayden* v. *Barney*, 5 "Wall., 107; *Goodlett* v. *L. & N. R. Co.*, 122 U. S., 391, "408; *United States* v. *Palmer*, 3 Wheaton, 610."

Opinion, p. 51.

The title of the Act of 1891 cannot be incorporated into the body of Act with such effect as to give to the repealing clause of that Act the power to annul all statutes specifically providing for interest on "judgments" and "decrees."

B. The statutes of the State of Michigan regulating the rate of interest "of money" have always been distinct

from those regulating the rate of interest on "judgments" and "decrees."

Supra, pp. 16, 17.

The subjects have not been treated as kindred.

C. The phraseology of the only section of the Act of 1891 regulating the rate of interest disputes the contention of the petitioner.

That section purports only to regulate at six per cent. the interest "of money," and then, as though carefully to shut out any other application of the regulations, it provides:

"Except that *in all cases* it shall be lawful for the par-
"ties to stipulate in writing for the payment of any rate
"of interest not exceeding eight per cent. per annum," &c., &c.

The words "in all cases" refer to all possible instances falling within the limits of the Act, and the Act authorizes the parties in all such cases to stipulate in writing for a rate higher than six per cent.

Would such phraseology be used if the Act contemplated the regulation of interest on judgments?

Would the judgment creditor and the judgment debtor be the parties to make such a stipulation?

D. In 1895 the Legislature of Michigan passed an Act, "that all the general laws *in force* in the State" be "collected and compiled," and provided for the appointment of two Commissioners to examine the statutes thus collected and to certify the same to be a correct compilation of all general laws "in force."

The scope of the compilation is defined in the first section of the Act:

"Section 1. That all the general laws *in force* in this
"State, and all general Acts and parts of Acts passed by
"the present Legislature which shall be approved and be-
"come laws, shall be collected and compiled without alter-
"ation under their appropriate heads and titles, etc."

Session Laws of Michigan, 1895, Act 268.

The Commissioners duly proceeded with their work.

They retained the old statute of 1838, as amended in 1855, regulating the rate of interest on "judgments" and "decrees" at seven per cent. then appearing as Section 1597 of Howell's Annotated Statutes of 1882, and made it Section 4865 of the new compilation.

They determined that the remaining portion of the Act of 1838, regulating the rate of interest "of money" had been repealed by the Act of 1891, and they inserted the provisions of the Act of 1891 as Section 4856 of the new compilation.

The compilation was then reported by the Commissioners to Governor Pingree, and was laid by him before the Legislature of 1897. That body provided for the incorporation therein of the general legislation of 1897, and for the "printing, binding and distribution" of the work under the title of Compiled Laws of the State of Michigan, 1897.

Session Laws of Michigan, 1897, Act 26.

E. The Courts of the State of Michigan have been in full accord with the Commissioners who made the compilation of 1891.

In 1894,—three years after the adoption of the Act of 1891, and, therefore, three years after the time when according to the petitioner's contention, the statute regulating the rate of interest on "judgments" and "decrees" at seven per cent. was repealed, the Supreme Court of the State enforced the statute, then commonly known as Section 1597 of Howell's Annotated Statutes, by allowing interest at seven per cent. upon a judgment for appellant's costs on an appeal from the Probate Court:

"A judgment for costs is as much a judgment as any "other, and is, therefore, within the terms of the statutes "* * * Interest upon claims allowed against the "estates of deceased persons, may be claimed under Sec. "1597, Howell's Ann. Statutes, which is broad enough to "cover the present case."

Hayden vs. *Hefferan*, 99 Michigan, 262.

In a still later case the same Court said:

"As between individuals it was settled in Hayden *vs.* "Hefferan that the prevailing party is *entitled to interest*

" *upon the costs* from the date of the judgment or de-
" cree; and that the State is subject to precisely the
" same liability for costs and for the incidents of a judg-
" ment as an individual would be, with the single excep-
" tion as to the method of collecting the demand."

F. & P. M. R. Co. vs. *State Auditor*, 102 Michigan, 500.

The contention of the petitioner necessarily leads to the claim that the Act of 1891 regulated interest at five per cent., not only upon "money," but upon all forms of debt, forbearance or adjudicated amounts, and that it repealed all statutes regulating rates of interest in all cases.

This would involve a repeal of the statutes regulating interest upon taxes and upon State funds.

But in 1896 the courts of Michigan construed and sustained, in respect of interest, such statutes antedating the Act of 1891.

University Regents vs. *Auditor General*, 109 Michigan, 134.

F. The title of a statute has little effect in the construction of the statute under ordinary circumstances:

" While the title to a statute should not be entirely
" ignored in determining the legislative intent, it cannot
" be used 'to extend or restrain any positive provision
" 'contained in the body of the act,' and is of little weight
" even when the meaning of such provisions is doubtful."

Goodlett vs. *Louisville Ry. Co.*, 122 U. S., 391, 408.

There are special explanations respecting the title of the Act of 1891, which show that it has even less than usual significance.

The legislative journals disclose that in 1891 a bill was introduced in the lower House of the Michigan Legislature designed to amend both the existing statute regulating the rate of interest "of money" and the existing statute regulating the rate of interest on "judgments" and "decrees."

It was as follows:

"A BILL

"To amend sections three and six of chapter forty-one of
" the compiled laws of 1871, being sections 1594 and
" and 1597 of Howell's Annotated Statutes, with refer-
" ence to interest on money and on judgments.

"SECTION 1. The People of the State of Michigan enact, "That sections three and six of the compiled laws of "1871, being compilers sections 1594 and 1597 of Howell's "annotated statutes of Michigan, 'with reference to in-"'terest on money and interest on judgments, verdicts, "'etc.,' be and the same are hereby amended to read as "follows:

"(Sec. 1594.) SEC. 3. The interest of money shall be "at the rate of five dollars upon one hundred dollars for "a year, and at the same rate for any greater or less sum "and for a longer or shorter time, except that in all cases "it shall be lawful for the parties to stipulate in writing "for the payment of any rate of interest not exceeding "ten per cent. per annum: Provided, that this act shall "not apply to existing contracts, whether due, not due, "or past due.

"(Sec. 1597.) SEC. 6. Interest may be allowed and "received upon all judgments at law, for the recovery of "any sum of money, and upon all decrees in chancery for "the payment of any sum or sums of money, whatever "may be the form or cause of action or suit in which "such judgment or decree may be rendered or made; and "such interest may be collected on execution, at the rate "of five per cent. per annum: Provided, that on a judg-"ment or decree upon any written instrument having a "different rate the interest shall be computed at the rate "specified in such instrument, not exceeding ten per cent. "per annum.

"SEC. 2. Act No. 138 of the session laws of 1887 is hereby "repealed, except as to all matters arising thereunder "before this act takes effect."

The bill was passed in the lower House.

House Journal, Vol. 1, pp. 100-789; Vol. 2, p. 1563.

The Senate did not concur with the bill as received, but after various amendments, passed it and sent it back to the lower House in severely modified form.

This bill was accepted by the lower House and became the Act of 1891.

In tracing the progress of the Act through the two houses we find that the title originally conformed with the body of the Act in regulating both the rate of interest "of money," and the rate of interest upon "judgments" but that the amendments of the title did not keep pace with the amendments of the body.

This history of the Act indicates a clear and deliberate judgment of the Legislature to leave the rate of interest in "judgments" and "decrees" where they found it and to change the rate of interest "of money."

In arriving at this result, they cut out much of the body of the bill that was under consideration, but omitted to give like attention to the title, thus giving an apt illustration to the remarks of this Court in *Hayden* vs. *Barney:*

"The title to an Act furnishes little aid in the construc-
"tion of its provisions, * * * It cannot be used to
"extend or restrain any positive provision contained in
"the body of the Act. It is only when the meaning is
"doubtful that resort may be had to the title, and even
"then it has little weight. *It is seldom the subject of*
"*special consideration by the Legislature.*"

Hayden vs. *Barney*, 5 Wallace, 107.

G. The petitioner has itself given a construction to the Act of 1891, indicating its recognition that the statute regulating the rate of interest on "judgments" and "decrees" at seven per cent. is still in force.

The decree of the District Court gave the same rate of interest, seven per cent., to those cargo underwriters who had thus intervened, as it gave to the owner of the *Conemaugh* individually and "as trustee."

Decree, pp. 24, 25.

The petitioner has paid to those cargo underwriters their respective decrees without availing of its right to have the matter reviewed.

Third Assignment of Error, p. 27.

Fourth.

THE ARGUMENT OF THE PETITIONER THAT SIX PER CENT. SHOULD BE ALLOWED AS BEING THE RATE UNIFORMLY ALLOWED IN THE ADMIRALTY COURTS OF THE UNITED STATES IS NOT ADMISSIBLE UPON THE PRESENT RECORD.

Whether or not six per cent. is the rate uniformly or ordinarily allowed in the Admiralty Courts of this country is a question not within the range of present inquiry.

This Court has already determined that interest should be paid "at the same rate per annum that decrees bear in "the courts of the State of Michigan."

The New York, 175 U. S., 187, 210.
Mandate, p. 23.

The only question now before this Court, so far as the rate of interest is concerned, is whether the District Judge has correctly ascertained the rate of interest payable upon decrees in the State of Michigan.

Ex parte Union Steamboat Co., 178 U. S., 317, 320.
The Lady Pike, 96 U. S., 461.
Ex parte Sibbald vs. *United States*, 12 Peters, 488, 492.

Fifth.

THE DECREE OF THE DISTRICT COURT SHOULD BE MODIFIED IN RESPECT OF THE ADJUSTMENT OF COSTS, AS PROVIDED IN THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS, AND SHOULD BE IN ALL OTHER RESPECTS AFFIRMED, WITH LEAVE TO THOSE CARGO UNDERWRITERS WHO HAVE INTERVENED IN THIS COURT TO RECOVER IN THEIR OWN NAMES THEIR RESPECTIVE INTERESTS IN THE RECOVERY MADE BY THE OWNER OF THE CONEMAUGH AS TRUSTEE.

WILHELMUS MYNDERSE,
Advocate for Intervenors.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 97.

THE UNION STEAMBOAT CO., PETITIONER,

vs.

THE ERIE AND WESTERN TRANSPORTATION CO., LIBELLANT, AND THE MANNHEIM INSURANCE CO. AND OTHERS, INTERVENORS.

It is hereby requested that leave be granted to any of the parties to seek in the district court, under the mandate of this court, such apportionment of the salvage expenses awarded to the libellant as was reserved under the final paragraph of the district court decree of July 3, 1896.

December 1, 1902.

GOULDER, HOLDING & MASTEN,
Proctors for E. and W. T. Co., Libellant.
WILHELMUS MYNDERSE,
Proctor for Intervenors.

[Endorsed:] File No. 18,159. Supreme Court U. S., October term, 1902. Term No. 97. The Union Steamboat Co., petitioner, *vs.* The Erie and Western Trans. Co. *et al.* Request for leave to any of the parties to seek apportionment in district court under mandate of this court. Filed Dec. 1, 1902.

Supreme Court of the United States.

No. 97.—October Term, 1902.

The Union Steamboat Company, Claimant of the Propeller "New York," Petitioner,
vs.
The Erie and Western Transportation Company et al.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 9, 1903.]

The facts of this case are fully set out in previous decisions of this court (175 U. S. 187; 178 U. S. 317.)

The steamer Conemaugh, owned by respondents, and the propeller New York, owned by the petitioner, collided in the Detroit River, November 11, 1891. The Conemaugh for herself, and as bailee of her cargo, filed a libel against the New York for the sum of $70,000 damages in the District Court for the Eastern District of Michigan. Subsequently certain underwriters of the cargo of the Conemaugh filed an intervening petition in the cause. Subsequently the New York, for damages sustained by her, filed a cross libel against the Conemaugh for $3,000 damages, sustained by the New York in the collision. No answer was filed to this cross libel.

The District Court held the New York to have been solely in fault, and passed a decree against her. The Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court on the ground that the Conemaugh had been solely in fault, and adjudged that her owners pay the owners of the New York, petitioners here, the damages sustained by the New York. The case was then brought here by certiorari, and both vessels were pronounced to have been in fault. The decrees of the lower courts were reversed and the damages caused by the collision ordered to be divided. The following is the material part of the judgment and mandate:

"On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in the cause be and the same is hereby reversed; the claimant of the Conemaugh and the claimant of the New York each to pay one-half of all costs in this cause.

"And that the said Erie and Western Transportation Company recover against the Union Steamboat Company $276.75 for one-half of the costs herein expended, and have execution therefor.

"And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest from July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the State of Michigan."

Upon the return of the case to the District Court that court made its decree in favor of the several intervening underwriters upon the cargo for their respective claims, with interest at seven per cent from July 3, 1896. The court also decreed that the owners of the cargo and their underwriters, other than the intervenors, by reason of the collision, sustained damages in the sum of $19,627.67, "for which the said Erie and Western Transportation Company appears in this suit as trustee only." And it was adjudged and decreed "that said trustee recover from the said Union Steamboat Company and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of $19,627.67, with interest thereon at the rate of seven per cent per annum, from July 3, 1896, until paid, and that it have execution therefor."

Judgment was also given in favor of the Conemaugh for one-half of the damages of that steamer, less one-half of the damages of the New York, with interest.

At the hearing in the District Court on the return of the mandate the petitioner "submited a decree to the effect that both vessels were in fault for the collision, and that the damage resulting therefrom be equally divided between the Erie and Western Transportation Company, owner of the Conemaugh, and the Union Steamboat Company, owner of the New York; that such damages amounted in all to the sum of $74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the steamboat company, $19,841.56; that the transportation company, as trustees for the underwriters and owners of the cargo of the Conemaugh, not intervening, suffered damages in the sum of $19,627,67; that, as owner of the propeller, it had suffered damages in the sum of $30,508.46, aggregating the sum of $50,136.13; that the transportation compauy recoverer of the petitloner one-half of $50,136.13, less one-half the sum of $19,841.5[illegible], decreed to be paid to the intervening petitioners, &c.

"The court, however, declined to enter this decree; refused to permit the petitioner to recoup any sum that it might pay to the owners or underwriters of the cargo of the Conemaugh, from any sum that was due from the steamboat company for damages sustained by the Conemaugh, so that such company was compelled to pay of the total damages about seventy-six per cent instead of fifty per cent." (178 U. S. 317, 318.)

The action of the District Court was affirmed by the Circuit Court of Appeals, (108 Fed. Rep. 102,) and the case was then brought here.

Mr. Justice McKENNA delivered the opinion of the Court.

There is one main and several subsidiary propositions asserted by petitioner. The main proposition is that in all cases of collision, if both vessels are in fault, the damages resulting are to be equally divided between the owners of the vessels.

The subsidiary propositions are that if one of the offending vessels pay more than half the damages to a third or innocent party she may recoup or set off such excess against any claim for damages which the other vessel may have without bringing in the other vessel as a co-defendant under admiralty rule 59, or filing other pleadings than an answer to the libel. In such case it is insisted that all the parties are before the court. And further, that it is not necessary upon an appeal to the Circuit Court of Appeals, or to this court, that the pleadings show a demand for recoupment—the hearing in both courts being a trial *de novo*.

The main proposition asserted may be conceded. It was the basis of our decision when the case was here on the first certiorari and determined the judgment rendered. (177 U. S. 187.) And if under some circumstances the other propositions could be applied, (which is not necessary to decide,) they cannot be under the circumstances of this case. The petitioner made no claim for a division of damages upon the original trial of the case. It asserted its own innocence and the entire guilt of the Conemaugh, and submitted that issue for judgment. It sought to escape all liability, not to divide liability, and on the issues hence arising judgments were entered against it, not only for the Conemaugh, but for the cargo owners, some having intervened, others still being represented by the Conemaugh. Petitioners maintained the same attitude in the Circuit Court of Appeals and in this court. After the decision in this court it changed its attitude, and for justification says it had no earlier opportunity to do so. It urges that the decision of the District Court was completely against it; the decision of the Circuit Court completely for it; and that the judgment from which its right of recoupment arose was rendered by this court.

But the controversy as presented by the pleadings was not only between the Conemaugh and the New York, but between the latter and cargo, and this court did not disturb the judgment obtained by the cargo owners against the New York. Explaining our decision we said:

"The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages

against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court."

The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh. Indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owners judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were represented by the Conemaugh. The New York, having been in fault, was responsible to the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the District Court rightly construed our mandate.

2. Our mandate directed that a decree be entered "with interest from July 3, 1896, until paid at the same rate per annum that decrees bear in the courts of the State of Michigan." The District Court and the Circuit Court of Appeals found the rate to be seven per cent. This is assigned as error.

The statute which provided for interest on judgments and decrees in Michigan at seven per cent was enacted in 1838, and has been carried forward with amendments into the various compilations of the statutes, and appears as section 4865, Compiled Laws of Michigan of 1897. It is as follows:

"Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the cause or form of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of seven per centum per annum: *Provided*, That on a judgment rendered or any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding ten per centum."

This section, it is insisted by appellants, was repealed by a statute passed in 1891, which statute was entitled "An act to regulate the interest of money on account, interest on money judgments, verdicts," &c., and provided as follows:

"Sec. 1. The People of the State of Michigan enact: That the interest of money shall be at the rate of six dollars upon one hundred dollars for a year and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be either due, not due or part due."

"Sec. 4. All acts or parts of acts contravening the provisions of this act are hereby repealed."

Subsequently the rate was reduced to five per cent by a statute passed September 22, 1899, which reads as follows:

"SEC. 1. That section one of act numbered one hundred and fifty-six of Public Acts of eighteen hundred and ninety-one, entitled, 'An act to regulate the interest of money, on account, interest on money judgments, verdicts,' &c., the same being compiler's section one thousand five hundred ninety-four of volume three of Howell's Annotated Statutes, and section four thousand eight hundred ninety-seven be, and the same is hereby, amended to read as follows:

"SEC. 1. The People of the State of Michigan enact: That the interest of money shall be at the rate of five dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding seven per cent per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be either due, not due or part due."

According to its title the act is one to regulate the interest of money on account and interest on money judgments. Section one, however, provides only "that the *interest of money* shall be at the rate of five dollars upon one hundred dollars for a year." It is urged, however, that section one must take meaning from the title of the act, and that by "interest of money" is meant "interest of money on account" and "interest on money judgments," and having that meaning it repeals section 4865, *supra*. But money on account and money judgments are distinguished in the title, and it is hard to suppose that the former was intended to include the latter in the body of the act. They are distinguished also in the prior statutes. "Interest of money" was provided for in section 3 of the act of 1838 in substantially the same language as in the acts of 1891 and 1899, and, it is certain, that it was not intended thereby to include interest on judgments and decrees. The latter were provided for in section eight of the act of 1838, which became section 4865, and as such has been given a place in the compiled laws of the State ever since.

If it is anomalous, as urged by counsel and as observed by the Circuit Court of Appeals, for legal interest in the State to be fixed at five per cent, and judgments left to bear seven per cent, we cannot correct the anomaly. Nor can we regard the words "interest of money" to have been suddenly given a meaning in 1891 or 1899 different from that which they had borne for over fifty years in the statutes of the State with the intention to work by implication the repeal of a provision with which for the same length of time they were regarded as consistent.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.